Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

W. DOW HAMM III AND
W. DOW HAMM III CORPORATION,

Petitioners,

v.

MILLENNIUM INCOME FUND, L.L.C.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas, First District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 12 of the Federal Arbitration Act, which sets a three-month deadline for motions to vacate an arbitration award, should be harmonized with Section 9 of the Act, which allows for immediate confirmation of an award, so that a party's right to judicial review is preserved, or whether, as the Texas Court of Appeals held, the statutes should be construed in a manner that defeats the right to judicial review.

PARTIES AND CORPORATE DISCLOSURE

The parties are all listed in the caption of this case. Pursuant to Rule 29.6 of the Rules of this Court, petitioner W. Dow Hamm III Corporation hereby states that it has no parent corporation, and that no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners W. Dow Hamm III and W. Dow Hamm III Corporation respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals of Texas for the First District.

OPINIONS BELOW

The opinion of the Court of Appeals of Texas is reported at 178 S.W.3d 256 and reproduced in the Appendix hereto ("App.") at App. 1. The trial court's judgment and order denying the motion to vacate the arbitration award are unreported and reproduced at App. 33 and 66. The orders of the Texas Supreme Court denying review and the motion for rehearing are unreported and reproduced at App. 67 and 68.

JURISDICTION

The judgment of the Texas Court of Appeals was rendered on July 28, 2005. App. 1. The Texas Supreme Court denied a timely petition for review on January 27, 2006. App. 67. The Texas Supreme Court denied a timely motion for rehearing on May 5, 2006. App. 68. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 9 of the United States Arbitration Act, 9 U.S.C. § 9, provides, in pertinent part: "[A]t any time within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. . . ."

Section 12 of the United States Arbitration Act, 9 U.S.C. § 12, provides, in pertinent part: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

STATEMENT OF THE CASE

A. Background.

Petitioners W. Dow Hamm III ("Mr. Hamm") and Hamm Corporation ("the Corporation") and Respondent Millennium Income Fund, L.L.C. ("Millennium"), were partners in seven partnerships (the "HM Partnerships"), formed to develop and own Marriott-brand hotels in Texas and Alabama. 4th Supp. Clerk's Record ("CR") at 2:372. The Corporation served as the general partner of the HM Partnerships, and Millennium and Mr. Hamm were limited partners. Their partnership agreements were complex and extensive, and were thoroughly negotiated with the assistance of counsel from two major Texas law firms.

Each of these agreements contained an arbitration clause stipulating that the parties' transactions involved "commerce" under the Federal Arbitration Act and requiring the parties to arbitrate any disputes "pursuant to the Federal Arbitration Act. . . ." 4th Supp. CR 2:417. This arbitration clause also provided that the arbitrator would have no power to "amend, supplement or reform in any manner any of the rights or obligations of any Partner hereunder or the enforceability of any of the terms of this Agreement." *Id.* The parties agreed that an arbitration award could be enforced by a court, but not if the arbitrator misinterpreted the parties' rights or obligations. *Id.*

The partnerships developed and opened six hotels between 1997 and 2002. Over this period, Millennium's management changed, as the managers who founded the company, negotiated the HM Partnership Agreements, and helped develop the partnerships' hotel businesses were replaced by new individuals who, in the words of Millennium's new president, were "not really interested in being in the hotel management business." 4th Supp. CR at 16:3439.

In early 2003, Millennium's new managers notified the Corporation that it disagreed with its assertion of rights, as general partner, to (1) hire certain lawyers, accountants, and other professionals, (2) negotiate and obtain financing for the hotels, (3) receive asset management fees, and (4) compensate Mr. Hamm for individually guaranteeing the repayment of millions of dollars in partnership debt. On April 24, 2003, Millennium formally demanded arbitration of these disputes. CR at 26.

B. The Arbitration Award.

The arbitrator heard four days of testimony, from July 14-17, 2003, and admitted more than 3,800 pages of documents into evidence. He delivered his award to the parties on the afternoon of August 26, 2003. In it, he (1) found that the Corporation had been authorized to hire some professionals, but not others; (2) determined that the Corporation had not been authorized to transfer $700,000 from one partnership to another to facilitate financing, but that its other financing decisions and arrangements were authorized; (3) interpreted the partnership agreements to deny the Corporation compensation in the form of asset management fees; and (4) interpreted the agreements to deny Mr. Hamm compensation for his loan guaranties. App. 42-56. The arbitrator expelled the Corporation as general partner, and ordered the partnerships' dissolution if there was no agreement on a new general partner. App. 64.

C. Proceedings Below.

The American Arbitration Association faxed the award to the parties on the afternoon of August 26, 2003. Three days later, on August 29, Millennium filed its motion to confirm the award in the 80th District Court of Harris County, Texas, and set it for hearing on the following Friday, September 5, 2003, at 9:30 a.m. CR 31, 33. Because August 29 was the last day before the Labor Day holiday weekend, there were only three working days between the filing of the motion and the hearing on the following Friday. Therefore, on Tuesday, September 2, the petitioners filed a request for continuance, in which they explained that they were opposed to confirmation, and that they would file a motion to vacate the award within 30

days. CR 53. At this early juncture, the official set of arbitration exhibits was unavailable to the parties, because it was in the custody of the arbitrator. At the September 5 hearing, the trial court denied a continuance, and signed its judgment confirming the award. App. 33.

The petitioners then filed a motion to vacate the arbitration award on October 3, 2003, just 38 days after the award's delivery, and 28 days after its confirmation. 3d Supp. CR at 1-6. This motion to vacate argued that the arbitrator's award had misinterpreted the partners' rights and obligations and, therefore, could not be judicially enforced under the express terms of the parties' arbitration clause.

Millennium's response to the motion to vacate argued, in part, that petitioners had waived their motion to vacate because it was not filed before the award was confirmed. At the hearing on the motion to vacate, the trial court heard arguments on the merits, and Millennium did not argue that the motion to vacate was untimely. Reporter's Record ("RR") at 4-9. The trial court denied the motion to vacate, and petitioners sought appellate review in the Texas Court of Appeals. In its appellee's brief in that Court, Millennium again did not argue that the motion to vacate was untimely.

At oral argument, the Texas Court of Appeals raised the issue of timeliness *sua sponte*. It asked counsel whether the early confirmation of the award barred the trial court and the court of appeals from considering the grounds of the motion to vacate. The petitioners submitted extensive post-submission briefing on the issue. App. 73-94. The court of appeals nevertheless held that "[a] motion to vacate, to modify, or correct an arbitration award must

be raised or considered before or simultaneously with a motion to confirm the award," even though the arbitration award was confirmed just 10 days after it was delivered. App. 24. Citing a Second Circuit decision, the court below held that the three-month deadline provided under the FAA "represents a maximum, not an absolute period upon which the challenging party may always rely." App. 15 (citing *The Hartbridge*, 57 F.2d 672, 673 (2d Cir. 1932)). As a result, the Texas court declined to consider the petitioners' arguments that the arbitrator had improperly modified their rights and obligations under their partnership agreements.

The petitioners timely sought discretionary review by the Texas Supreme Court, which the court denied. App. 67. On May 5, 2006, the Texas Supreme Court denied petitioners' motion for rehearing. App. 68. In the Texas Supreme Court, the petitioners argued, at length, that Sections 9 and 12 of the FAA should be reconciled to preserve the right to judicial review. App. 95-119.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Texas court's decision conflicts with the plain language of the Federal Arbitration Act, and denied petitioners their right to judicial review of the arbitrator's award.

At its enactment, the FAA was carefully drafted to address contemporaneous fears that there would be insufficient judicial or appellate review of mistaken arbitration awards. The Act's principal author explained that its procedures allowing for judicial review were an

important check on "mistakes and other human frailties" in arbitrators and trial courts. Julius Henry Cohen, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 274 (1926). The Texas court's attempt to reconcile the language of Sections 9 and 12 is entirely unsatisfactory because it unnecessarily deprives parties of the important right to judicial review of arbitration awards.

With little effort, Sections 9 and 12 may be harmonized to give effect to the plain language of both. By its terms, Section 9 states that a trial court confronted by an application to confirm an arbitration award "must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. Section 12 requires that "a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. Giving both provisions meaning leads to the natural and reasonable conclusion that an arbitration award may be immediately confirmed under Section 9, but it remains subject to judicial review so long as a motion to vacate is filed within three months under Section 12.

This is, in fact, what the drafters of the FAA intended. As Julius Henry Cohen explained:

> [T]here need be a delay only of a few days between the time of application for its entry as a judgment – *which may follow immediately upon the award* – and its actual entry, and upon its entry it takes status as any other judgment, subject to execution and enforcement.
>
> The motion to confirm may be opposed or an independent motion may be made to vacate, modify, or correct the award.

Cohen, *The New Federal Arbitration Law*, 12 VA. L. REV. at 272 (emphasis added). Thus, the FAA allows immediate confirmation of an arbitration award as a judgment, and an "independent motion" to vacate, even if the award is immediately confirmed.

There is no principled reason why the immediate confirmation of an arbitration award should prevent a trial court from considering an independent, timely filed, motion to vacate. The court below misunderstood the effect of confirmation, which simply allows the recovering party to use judicial processes to enforce and collect the award. *Florasynth, Inc. v. Pickholz*, 750 F.2d. 171, 176 (2d Cir. 1984); 4 IAN R. MACNEIL, FEDERAL ARBITRATION LAW § 38.1.1 at 38:5 (1994). Confirmation "is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Florasynth*, 750 F.2d at 176. As Professor Macneil observes, "[c]onfirmation is expected normally to be a routine and unopposed hearing." 4 MACNEIL § 38.3.2 at 38:38. Section 12, however, expressly allows the filing of a motion to vacate for three months, a period that extends beyond the very short time it takes to obtain summary confirmation of an arbitration award.

In interpreting the FAA, this Court has relied on the comments to the Revised Uniform Arbitration Act, which seeks to "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal Arbitration Act]." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002). The drafters of the RUAA, which includes similar provisions on confirmation and enforcement, have explained the interaction of the statute's terms:

> If the winning party files a motion to confirm prior to 90 days after the arbitrator gives notice of the award, the losing party can either (1) file a motion to vacate or modify at that time or (2) file a motion to vacate or modify within the 90-day statutory period.

REVISED UNIF. ARBITRATION ACT § 22, comment 1, 7 U.L.A. 66 (2000).

The court below construed the statute in a manner that renders the three month deadline for filing a motion to vacate superfluous, and thereby deprived the petitioners of important federal rights. A decision by this Court on this important question of federal law would resolve any perceived conflict between the express terms of Sections 9 and 12, and vindicate the rights of judicial review secured by the FAA.

II. The issue is important and recurring.

A. Courts have reached inconsistent results in reconciling Sections 9 and 12.

The court below relied on language from the Second Circuit's decision in *The Hartbridge*, 57 F.2d 672, which has contributed to judicial confusion over the interaction between Sections 9 and 12 for more than 70 years. This confusion is owed, in part, to the sparse language of the relevant statutory provisions. In cases where a party seeks judicial confirmation before the expiration of the three-month deadline for challenging the award, the FAA provides little express guidance. While Section 12 allows a trial judge to order a stay of "proceedings of the adverse party to enforce the award" when a motion to vacate is

filed, App. 71, such a stay is not mandatory. Decisional law has filled this statutory gap, with inconsistent results.

The Second Circuit addressed the gap, shortly after the enactment of the FAA, in *The Hartbridge*. In that case, the district court had confirmed an award just 25 days after its delivery, after denying the opposing party's request for a continuance of the hearing to allow it time to prepare a motion to vacate. 57 F.2d at 673. The Second Circuit disagreed with the district court's determination that a motion to vacate could be filed after confirmation: "Section 12 sets an outside limit within which a notice to vacate must be served; it does not say that such a motion may be made at any time within the three months even though the award has gone to judgment." *Id.* The court reversed the district court's order confirming the award, and remanded to the district court with directions that "the appellant may still assert objections to the confirmation of the award." *Id.*

The Second Circuit's decision in *The Hartbridge* has been cited many times in the intervening years. Some courts, like the court below, have given literal credence to its suggestion that a party cannot move to vacate a judicially confirmed award. *Brown v. Bridgeport Rolling Mills Co.*, 245 F.Supp. 41, 45 (D. Conn. 1965); *Kanuth v. Prescott, Ball & Turben, Inc.*, No. 88-1416, 1990 U.S. Dist. LEXIS 7406 (D.D.C. June 8, 1990); *Humbert v. Kaner*, No. 90 Civ. 843, 1991 U.S. Dist. LEXIS 1491 (S.D.N.Y. Feb. 8, 1991).

Other cases, however, have not followed the Second Circuit's conclusion that Section 12 sets only "an outside limit" of three months, which may be manipulated by the early filing of an application for confirmation. In *Paley*

Assocs., Inc. v. Universal Woolens, Inc., 446 F.Supp. 212 (S.D.N.Y. 1978), the district court was asked to postpone ruling on a motion to confirm an arbitration award, and to provide the responding party an opportunity to cross-move for an order vacating the award. *Id.* at 215. The district court denied the request, confirmed the award, and explained: "[H]aving now registered its objection to confirmation of the award, [Paley] has preserved its right to move later to vacate the confirmation if it has any worthy grounds to do so." *Id.* at 216. The *Paley* court properly recognized that the confirmation of an award does not bar subsequent review by the trial court or by appellate courts. *See also Ridgewood Indus., Ltd. v. Ridgewood Indus., U.S.A., Inc.*, No. 83 C 2969, 1983 U.S. Dist. LEXIS 11917 (N.D. Ill. Nov. 7, 1983) (considering post-confirmation motion to vacate because "defendants never received an opportunity to oppose confirmation"). The opinion of the court below conflicts with this sound precedent, which construes the FAA in a manner that preserves judicial review.

B. This Court's recent decisions have expanded the FAA's reach into state courts.

When *The Hartbridge* was decided, state courts would not have deemed it relevant to their decisions, because the FAA was widely understood to be "a procedural statute, applicable only in federal courts. . . ." *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting). This Court has since determined that the FAA is substantive law that governs arbitration cases in state courts as well. *Southland Corp. v. Keating*, 465 U.S. at 16. The Act is "something of an anomaly in the field of federal-court jurisdiction"; while its enforcement is largely left to state

courts, "it nevertheless represents federal policy to be vindicated by the federal courts where otherwise appropriate." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983).

The full extent of the FAA's application in state courts was decisively confirmed by the Court's decision in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995), when it concluded that the Act reaches the limits of Congress' Commerce Clause power. A decision by this Court on this important question of federal law would benefit the many thousands of parties who now rely on the provisions of the Federal Arbitration Act to confirm and to challenge arbitration awards, in state and in federal court, each year.

C. The denial of judicial review frustrates important contractual expectations.

In deciding not to review the merits of the motion to vacate the arbitration award, the court of appeals avoided an important question: whether the parties' arbitration agreement enlarged the standard of review under the Federal Arbitration Act.

In their partnership agreements, the parties negotiated for an arbitration clause that expanded the powers of the courts to review any arbitration award for legal error. They agreed that an arbitrator could not amend, supplement, or reform in any manner the rights or obligations of the partners under their partnership agreements, and that an arbitration award that misinterpreted the rights and obligations of the partners could not be enforced by a court. This agreement to limit the arbitrator's powers expanded the grounds for vacating an award and the

judicial standard of review provided by the FAA. *See* 9 U.S.C. § 10 (stating statutory grounds for vacating awards); App. 69-70.

As arbitration has become ubiquitous, parties have agreed to its use to resolve complex disputes involving tremendous stakes. As a check on "mistakes and other human frailties," parties to complex transactions have contracted for expanded review as a means of securing correct results in the arbitration process. A concise summary of this development is provided in a recent article:

> In recent years, there has been "growing concern" about the "risks presented by arbitration's limited scope of review." Arbitrators selected for their familiarity with a particular industry often lack the sophistication to appreciate all of the legal issues raised. As a result, there have been "several conspicuous, high stake disputes" and countless lower-profile cases in which arbitrators have issued decisions "well outside the reasonable expectations of the parties." To offer protection against such unpredictable or biased decision-making, without sacrificing all the benefits of arbitration, parties have begun to include clauses in their arbitration agreements seeking to expand the scope of judicial review.

Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOTIATION L. REV. 171, 173 (2003).

Within the Fifth Circuit, it is established that parties are generally free to structure their arbitration agreements to enlarge the scope of judicial review. *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) and *Volt Information Sciences,*

Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).[1] In Texas state courts, the weight of authority also accords the right to contractually expand the scope of judicial review. *See Mariner Fin'l Group, Inc. v. Bossley*, 79 S.W.3d 30, 36 (Tex. 2002) (Owen, J., concurring) (assuming, without deciding, that parties can contractually enlarge the standard of review under the FAA); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 251 (Tex. App. – Houston [14th Dist.] 2003, pet. denied) (surveying national decisions and concluding that "[t]he parties may agree to expand judicial review of an arbitration award beyond the scope of the FAA.").

Hamm and Millennium employed lawyers to draft, negotiate, and execute partnership agreements that set out their respective rights and obligations. Recognizing that the stakes were high and that conflict was possible, they also agreed on a dispute resolution procedure that they believed would be the most likely to arrive at a reliably correct result.

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[1] There is a split among the circuits as to whether parties can contractually enlarge the standard of review under the FAA, with the Third, Fourth, and Fifth Circuits holding that parties may bargain for an expanded standard of review, inasmuch as arbitration is a creature of contract. *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001), *cert. denied*, 534 U.S. 1172 (2002); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (table), 1997 WL 452245 (4th Cir. Aug. 11, 1997) (per curiam); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995). The Ninth and Tenth Circuits have held to the contrary, and this Court has not yet resolved the conflict. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003), *cert. dismissed*, 540 U.S. 1098 (2004); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001)).

The petitioners took painstaking care in interpreting their rights and obligations under the partnership agreements. They relied on the advice of counsel in performing the Agreement. When Millennium challenged the Corporation's right to be compensated for its services as general partner, the dispute was referred to arbitration. To ensure that meaningful judicial review would be available, the parties paid a court reporter to transcribe the arbitration hearings, so that a complete record was made available to the trial court and the court of appeals. At every stage of the arbitration and judicial proceedings, the parties have engaged legal counsel. These proceedings bear witness to the parties' expectation that a non-jury proceeding, with judicial review of the arbitration award, was the best vehicle for protecting their rights under their agreements.

The Texas court's holding that the petitioners waived any right to review of the arbitrator's award frustrates the parties' contractual expectations that the arbitrator would carefully and correctly interpret their agreement, and his award would not be judicially enforceable if he did not. Accordingly, the decision of the court below implicates important federal questions regarding the availability of judicial review.

D. Due process concerns.

Under the holding of the court below, the FAA denied petitioners the opportunity to present their objections to the arbitration award in the trial court, even though the award was confirmed almost immediately, before the arbitration record was available to the parties and before petitioners had time to prepare and file a motion to vacate. This was a denial of due process. As this Court observed,

in another case from the Texas Court of Appeals for the First District, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 81 (1988).

What process is due is measured by a flexible standard that depends on the practical requirements of the circumstances, and includes three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). All of these elements are present in this case.

Substantial private interest. The arbitrator's award ordered the removal of the Corporation as general partner of the partnerships in which Millennium was a limited partner, and the appointment of a receiver who has since caused the partnerships to dissolve and to sell their assets, six Marriott hotels located in Texas and Alabama. The "serious consequence" of losing one's property rights without a meaningful opportunity to be heard is a due process violation. *Peralta*, 485 U.S. at 81.

Substantial risk of erroneous deprivation. The risk of an erroneous deprivation is greater if the immediate confirmation of an arbitration award prevents a trial or

appellate court from considering the grounds for setting it aside. A trial court is free to confirm an arbitration award immediately after it is confirmed. 9 U.S.C. § 9. There need be "a delay only of a few days" between the arbitrator's delivery of an award and its entry as a judgment. Cohen, *The New Federal Arbitration Law*, 12 VA. L. REV. at 272. If, as the FAA expressly allows, a motion to vacate may still be granted if it is filed within three months, the risk of immediate confirmation causing an erroneous deprivation is cured. Under the court below's interpretation of the FAA, however, immediate confirmation prevents a court from ever reviewing the award.

No governmental interest. It is difficult to imagine any interest that the government has in barring consideration of a motion to vacate in cases where an arbitration award is immediately confirmed. The truth is quite the opposite in light of the actual language of the FAA, which allows an independent motion to vacate to be considered after an award is confirmed as long as vacatur is sought within three months of delivery. 9 U.S.C. § 12. This Court's precedent suggests that due process requires judicial review of arbitration awards. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985) (addressing due process concerns); *see also Glennon v. Dean Witter Reynolds*, 83 F.3d 132, 139 (6th Cir. 1996); *McClelland v. Azrilyan*, 31 F.Supp. 2d 707, 712 (W.D. Mo. 1998). The governmental interest in due process calls for a literal construction of the FAA, one that facilitates judicial review and does not frustrate it, in contrast with the Texas court's holding in this case.

The arbitrator's award of punitive damages against the petitioners compounds the due process problem. Due process requires judicial review of a punitive damages

award for excessiveness, rationality, and evidentiary support, even in arbitration cases. *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d at 139 (6th Cir. 1996) ("We conclude that the manifest disregard of the law standard permits vacatur of those punitive damage awards that are supported by no evidence."); *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 274-75 (N.Y. App. Div. 2003) (applying rigorous judicial review, under FAA, to award of punitive damages out of due process concerns).

The Texas court's holding denied the petitioners an appropriate and meaningful opportunity to be heard. The arbitration statutes provided the petitioners a three-month period for filing their motion to vacate, and it was impossible for them to obtain the arbitration record and file a motion to vacate before September 5, 2003, as detailed in their uncontroverted motion for continuance. 5th Supp. CR at 3. In requiring that a motion to vacate must be filed even before the complete arbitration record was available, the Texas court created an impossible and unconstitutional condition for judicial review.

As a result of the Texas Court of Appeals' holding that the petitioners have waived judicial review, the Texas appellate courts did not substantively review the arbitrator's interpretation of the partnership agreements in this case. Mr. Hamm has developed real estate in Texas and Oklahoma for more than 30 years, and as the arbitration record reflects, his reputation for honesty, skill, and competence is among his greatest assets. 4th Supp. CR at 16:3494. The arbitrator's mistaken view that Mr. Hamm's actions were not authorized by the partnership agreements has threatened his reputation, his contractual

expectations and his livelihood. Similarly, the Texas court's mistaken holding has threatened the petitioners' rights to judicial review and due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Opinion issued July 28, 2005

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-03-01209-CV

W. DOW HAMM III AND DOW HAMM III CORPORATION, Appellants

V.

MILLENNIUM INCOME FUND, L.L.C., Appellee

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2003-13955

OPINION

Appellants, W. Dow Hamm III and Dow Hamm III Corporation (together, "the Hamm parties"), appeal the trial court's final judgment in favor of appellee, Millennium Income Fund, L.L.C. ("Millennium"), entered upon confirmation of an arbitration award. The Hamm parties simultaneously challenge the confirmation of the arbitration award and the denial of their post judgment motion to vacate or to modify the arbitration award. We determine whether the Hamm parties' motion to vacate the arbitration award was untimely, so that the trial court erred neither in overruling the motion nor in confirming the arbitration award. We affirm.

Background[1]

In the late 1990s, Millennium and the Hamm parties formed seven limited partnerships for the purpose of developing seven hotels. Dow Hamm III Corporation was the general partner, and W. Dow Hamm III and Millennium were limited partners. The partnership agreements contained identical arbitration provisions.

The parties' relationship eventually deteriorated, Millennium alleged (and the Hamm parties denied) because the Hamm parties had made unauthorized payments to Dow Hamm III Corporation. In March 2003, Millennium sued the Hamm parties, seeking a temporary restraining order and temporary and permanent injunctive relief to prevent the Hamm parties from "making further unauthorized payments to themselves and others" while the parties pursued the arbitration required by their partnership agreements.

Arbitration proceeded, with the arbitration hearing taking place from July 14, 2003 until July 17, 2003. The arbitrator rendered his award, and the award was transmitted to the parties, on August 25, 2003. Among other things, the arbitrator ordered an accounting of the partnerships, expelled Dow Hamm III Corporation as the general partner, permanently enjoined the Hamm parties from taking certain actions, ordered the Hamm parties to pay actual damages of $700,000 and exemplary damages of $150,000, ordered the limited partners to agree on a

[1] Many of the factual statements in the parties' briefs come from the arbitration record (contained in the fourth supplemental clerk's record), which, for the reasons discussed below, it is not clear that we may consider on appeal. Our factual discussion thus includes only those matters shown by other portions of the reporter's and clerk's records.

new general partner within 90 days or face dissolution of the partnerships, and ordered that each party bear its own attorney's fees and arbitration expenses.

On August 29, 2003, Millennium moved to confirm the arbitration award. The confirmation hearing was set for September 5, 2003. On September 2, 2003, the Hamm parties moved for a continuance of the confirmation hearing,[2] stating, in pertinent part, as follows:

> [The Hamm parties] respectfully request a continuance on Millennium's application for confirmation of the arbitration award because they intend to prepare and present motions to vacate and/or modify the arbitration award pursuant to Texas Civil Practice and Remedies Code, Sections 171.088 and 171.091. These statutes allow applicants to contest arbitration awards within ninety (90) days of the date the applicant receives a copy of the award.
>
> Although Respondents do not anticipate needing ninety (90) days to properly contest the arbitration award, they do request a reasonable amount of time to do so. Arbitration in this matter was lengthy, lasting four (4) days. Numerous witnesses testified. Four (4) volumes of transcribed testimony were generated and over one thousand (1,000) pages of exhibits were introduced. Respondents contend there are substantial factual and legal errors in the award and would respectfully request thirty (30) days to properly prepare their motions to contest the

[2] The appellate record did not contain the Hamm parties' motion for continuance until they supplemented the record with that motion after oral argument in this cause.

> arbitration award prior to it[s] being confirmed by this Court under Section 171.087.

The trial court denied the Hamm parties' motion for continuance without specifying grounds on September 5, 2003, the date on which the court also heard Millennium's confirmation motion. We have no reporter's record from the September 5 confirmation hearing, and nothing in our record indicates what the parties and court might have discussed concerning the continuance motion at that hearing. The clerk's record contains no written objection to confirmation of the award, or any motion to vacate or to modify the award, filed by the Hamm parties at that time; of course, as their continuance motion indicated, neither did the Hamm parties file any of the arbitration record at that time. At the September 5 hearing, the trial court entered a final judgment confirming the arbitration award and rendered judgment against the Hamm parties.

On October 3, 2003, the Hamm parties filed a "motion to vacate or modify judgment and arbitration award." They also filed the record and exhibits from the arbitration proceeding on the same date. Millennium responded to the Hamm parties' motion to vacate or to modify the judgment and award, asserting, in part, that that motion was untimely for having been filed after final judgment confirming the award. In their post judgment motion attacking the judgment and arbitration award, the Hamm parties did not complain about the trial court's denial of their motion for continuance of the confirmation hearing, but instead challenged the merits of the arbitration award on contractual and statutory grounds. *See* 9 U.S.C.S. §§ 10-11 (West 1997 & Supp. 2005) (allowing for vacating, modifying, or correcting arbitration award under certain circumstances); TEX. CIV. PRAC. & REM. CODE ANN.

§§ 171.088, 171.091 (Vernon 2005) (same)[3] The Hamm parties' motion did not refer to the arbitration record and exhibits, and neither the Hamm parties nor the trial court specifically referred to the arbitration record and exhibits at the brief hearing on the Hamm parties' post judgment motion. At the end of the hearing, the trial court denied the motion to vacate or to modify the judgment and award without stating its reasons.

Post-Judgment Motion to Vacate or to Modify

In three issues, the Hamm parties attack the merits of the arbitration award on various statutory and contractual grounds.

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[3] The parties' arbitration agreement provided that the Federal Arbitration Act ("FAA") would apply to arbitration of their disputes, although the agreement did not expressly mention whether the FAA applied to confirmation of the award. *See* 9 U.S.C.S. §§ 1-16 (West 1997 & Supp. 2005). The parties moved for confirmation of, and for vacatur or modification of, the arbitration award under the Texas General Arbitration Act ("TAA"). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-.098 (Vernon 2005). However, on appeal, they assert that the FAA applies to the merits of the rulings granting the motion to confirm and denying the motion to vacate or to modify the arbitration award. Parties may validly contract for application of the FAA. *See In re Kellogg Brown & Root*, 80 S.W.3d 611, 617 (Tex. App. – Houston [1st Dist.] 2002, orig. proceeding). However, we also note that Texas procedure applies even when the FAA applies substantively. *See J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 839 (Tex. App. – Fort Worth 2002, pet. denied). We need not determine whether confirmation of an award – particularly, at what time a party must file a motion to vacate, to modify, or to correct an award after a motion to confirm the award has been filed – is procedural or substantive or which act applies because our conclusion would be the same under either act.

A. Statutes Governing Confirmation of Arbitration Awards

Concerning confirmation of arbitration awards, the FAA and the TAA provide in pertinent part as follows:

> § 9. Award of arbitrators; confirmation; jurisdiction; procedure
>
> *[A]t any time* within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court *must grant* such an order *unless* the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. . . .

9 U.S.C.S. § 9 (West 1997) (emphasis added).

> § 171.087. Confirmation of Award
>
> *Unless grounds are offered* for vacating, modifying, or correcting an award under Section 171.088 or 171.091, the court, on application of a party, *shall confirm* the award.

TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (Vernon 2005) (emphasis added).

B. Statutes Governing Vacating, Modifying, or Correcting Arbitration Awards

Concerning vacating, modifying, or correcting arbitration awards, the FAA and the TAA provide in pertinent part as follows:

> § 10. Same; vacation; grounds; rehearing
>
> (a) In any of the following cases the United States court in and for the district wherein

the award was made *may make* an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly exercised them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.S. § 10 (West 1997) (emphasis added).

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made *may make* an order modifying or correcting the award upon the application of any party to the arbitration –

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order *may modify and correct* the award, so as to effect the intent thereof and promote justice between the parties.

Id. § 11 (West 1997) (emphasis added).

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award *must be served* upon the adverse party or his attorney *within three months* after the award is filed or delivered. . . .

Id. § 12 (West 1997) (emphasis added).

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

. . .

The judgment so entered shall have the same force and effect, in all respects, *as*, and be subject to all the provisions of law relating to, *a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.*

Id. § 13 (West 1997) (emphasis added).

§ 171.088. Vacating Award

(a) On application of a party, the court *shall vacate* an award if:

(1) the award was obtained by corruption, fraud, or other undue means;

(2) the rights of a party were prejudiced by:

(A) evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) corruption in an arbitrator; or

(C) misconduct or willful misbehavior of an arbitrator;

(3) the arbitrators:

(A) exceeded their powers;

(B) refused to postpone the hearing after a showing of sufficient cause for the postponement;

(C) refused to hear evidence material to the controversy; or

(D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or

(4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.

(b) A party *must* make an application under this section *not later than the 90th day* after the date of delivery of a copy of the award to the applicant. . . .

(c) If the application to vacate is denied and a motion to modify or correct the award is not pending, the court *shall confirm* the award.

TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (Vernon 2005) (emphasis added).

§ 171.091. Modifying or Correcting Award

(a) On application, the court *shall modify or correct* an award if:

(1) the award contains:

(A) an evident miscalculation of numbers; or

(B) an evident mistake in the description of a person, thing, or property referred to in the award;

(2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or

(3) the form of the award is imperfect in a manner not affecting the merits of the controversy.

(b) A party *must* make an application under this section *not later than the 90th day* after the date of delivery of a copy of the award to the applicant.

> (c) If the application is granted, the court *shall modify or correct* the award to effect its intent *and shall confirm* the award as modified or corrected. If the application is not granted, the court *shall confirm* the award.

Id. § 171.091 (Vernon 2005) (emphasis added).

> § 171.092. Judgment on Award
>
> (a) On granting an order that confirms, modifies, or corrects an award, the court *shall* enter a judgment or decree conforming to the order. *The judgment or decree may be enforced in the same manner as any other judgment or decree.*

Id. § 171.092(a) (Vernon 2005) (emphasis added).

C. Discussion

1. The Statutory Language

We begin by examining the statutory language. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). Both the FAA and TAA require the trial court to confirm an arbitration award *unless* "grounds are offered for vacating, modifying, or correcting an award" (TAA) or the award "is vacated, modified, or corrected" (FAA). *See* 9 U.S.C.S. § 9; TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (Vernon 2005). Under these provisions, confirmation is the default result unless a challenge to the award has been or is being considered. *See id.* These provisions thus imply a due order of consideration: they contemplate that any motions to vacate, to modify, or to correct the award must be pending before the court for its consideration, or must already have been ruled on, at the time that the court

considers the motion to confirm. *See Robinson & Wells, P.C. v. Warren*, 669 P.2d 844, 847-48 (Utah 1983).[4]

---

[4] The *Warren* court reasoned:

> Section 15 directs that the court "shall grant" the order confirming the award "unless the award is vacated, modified or corrected" provided in sections 16 and 17. *In context, including the specific requirement of written notice to the adverse party, this section apparently contemplates that any motions to vacate, modify, or correct will be before the court when it rules on the motion to confirm. . . .*
>
> This construction is further confirmed by the provision directing entry of a conforming judgment or decree upon granting of an order "confirming, modifying, correcting or vacating an award," § 78-31-19, *since that direction apparently contemplates that the court would consider such motions together rather than in succession.* Otherwise, the procedures, hearings, and action of the court in the motion to confirm could be held for naught and the whole process repeated. We do not readily infer a legislative intent to squander scarce judicial time in this manner. *Although there is no express provision to this effect, we hold that the fair intendment of the Arbitration Act bars the filing of motions under sections 16 and 17 once the court has entered a judgment confirming the award under section 15.* This construction facilitates the limited scope of review and the considerations of finality sought to be served by our policies on judicial review of arbitration awards.

Robinson & Wells, P.C. v. Warren, 669 P.2d 844, 847-48 (Utah 1983) (citations and footnotes omitted; emphasis added).

The Hamm parties argue that we may not consider the *Warren* court's holding because, in that case, the appellant moved to vacate the award not only after judgment, but outside the three-month statutory period for filing such motions. *See id.* at 845. Although the *Warren* court itself noted this fact, that was not the primary basis for its disposition; rather, the court identified this as an *additional* basis to deny appellate relief. *Id.* at 848 n.6. That additional basis, however, was separate from, and did not convert into dictum, *the primary* basis for the court's holding: that a motion to vacate could not, under the statutes' plain language, be brought after judgment confirming the award had been rendered. *Id.* at 847-48 (discussing the two bases separately, the filed-outside statutory-time-limit basis being noted only in footnote as alternative ground for disposition).

Additionally, the TAA provides that (1) if the court denies a motion to vacate, to modify, or to correct an arbitration award, it must confirm the award and (2) if the court grants a motion to modify or to correct an award, it must confirm the award as modified or corrected. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.088(c), 171.091(c). Taken together with the section requiring confirmation unless statutory grounds not to do so are shown, sections 171.088(c) and 171.091(c) also indicate that motions to modify, to vacate, and to correct an arbitration award should be heard either before or simultaneously with motions to confirm the award.

Finally, both the FAA and the TAA provide that a judgment confirming (or modifying or correcting) an arbitration award is a final judgment like any other. *See* 9 U.S.C.S. § 13 ("The judgment so entered shall have the same force and effect . . . as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."); TEX. PRAC. & REM. CODE ANN. § 171.092(a) (providing that, when court "grant[s] an order" confirming, modifying, or correcting arbitration award, court "shall enter a judgment or decree conforming to the order," and judgment or decree "may be enforced in the same manner as any other judgment or decree."). Consequently, *requiring* a trial court to consider a motion, filed for the first time after judgment, that seeks to vacate, to modify, or to correct that judgment – in effect the Hamm parties' position because they argue that a trial court would abuse its discretion by *not* considering such a motion filed at that time – could, in certain circumstances, interfere with the same judgment's enforcement and with the presumption of finality that third parties, such as title

companies and creditors, are entitled to place upon it. *See Martin v. Hydraulic Fishing Supply, Inc.*, 66 Wash. App. 370, 378, 832 P.2d 118, 123 (Wash. App. 1992) (Forrest, J., concurring, joined by Webster, A.C.J.) (noting same problems if motion to vacate is considered after judgment confirming arbitration award). Put simply, we doubt that the respective legislative branches intended to require a trial court to consider such a motion when it is filed for the first time during a period that they also expressly designated for the judgment's enforcement. Additionally, requiring a court to consider a motion to vacate filed after judgment, but before the statutory 90-day or three-month period expires, could also create "unique exception[s] to the normal rules governing the modification and amendment of judgments" by, in effect, extending a trial court's plenary power to consider post judgment motions beyond 30 days, in conflict with the procedural rules applicable to all other judgments. *Id.*, 66 Wash. App. at 379, 832 P.2d at 123 (Forrest, J., concurring); *see* TEX R. CIV. P. 329b(a), (g). This would be an odd result indeed for a judgment that, by express statutory declaration, is to be treated like any other final judgment. *See* 9 U.S.C.S. § 13; TEX. CIV. PRAC. & REM. CODE ANN. § 171.092(a).

2. The Case Law

The scant case law on the issue conflicts. However, we conclude that the better reasoned authority supports our reading of the statutes. Moreover, the only Texas authority on this issue necessitates today's holding.

Although both the FAA and TAA allow a party who wishes to challenge an arbitration award a certain period to move to vacate, to modify, or to correct an arbitration

award,[5] courts have held that that period of time represents a maximum, not an absolute period upon which the challenging party may always rely. *See The Hartbridge*, 57 F.2d 672, 673 (2nd Cir. 1932) (holding, under FAA, that party seeking to confirm arbitration award may do so even before expiration of three-month period in which party challenging award is allowed to move to vacate, to modify, or to confirm award, thus, if party moves for confirmation before three-month period ends, other party must raise any challenges then, too); *City of Baytown v. C.L. Winter, Inc.*, 886 S.W.2d 515, 520-21 (Tex. App. – Houston [1st Dist.] 1994, writ denied) (adopting holding and analysis in *The Hartbridge* in case in which TAA applied); *see also Clearwater v. Skyline Constr. Co.*, 67 Wash. App. 305, 315, 835 P.2d 257, 263 (Wash. App. 1992, rev. denied) (regarding statutory three-month period in which to move to vacate arbitration award, stating, "This could be read to mean that 3 months is the *maximum* period in which a motion to vacate may be filed, not that the 3-month period is available in every situation. Generally, when a motion to confirm an arbitration award is filed within the 3-month period, the motion to vacate should also be brought at that time so that the two motions can be heard together.") (citations omitted; emphasis in original). That is, one party's motion to confirm the award "puts the other party to his objections" to the award then and there, even if time remains on the statutory period in which the challenger would otherwise be entitled to move to vacate, to modify, or to correct the award. *The Hartbridge*, 57 F.2d at 673; *see Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2nd Cir.

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[5] *See* 9 U.S.C.S. § 12 (three months); TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.088(b), 171.091(b) (90 days).

1984) (describing the holding in *The Hartbridge* as follows: "On appeal, we . . . held that one party's motion to confirm an arbitration award imposes on the other party an obligation to move to vacate if he intends to do so."); *C.L. Winter*, 886 S.W.2d at 521 (quoting the above-referenced holding of *The Hartbridge* with approval); *see Warren*, 669 P.2d at 846-48 (concluding that relevant statutory provisions contemplated that motions to vacate, to modify, or to correct arbitration award be before court when it rules on motion to confirm).

Going a step further, at least one federal court has held that, if a party moves to confirm the arbitration award, then the party opposing the award may not "idly stand by, allow the award to be confirmed and judgment thereon entered, and then move to vacate the award just as though no judgment existed." *The Hartbridge*, 57 F.2d at 673.[6] Some of the limited state authority on the matter

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[6] By post-submission letter briefing, the Hamm parties offer three reasons that we not follow *The Hartbridge* court's cited holding. First, they argue that this was not a true holding. However, *The Hartbridge* court understood this discussion as necessary to its ultimate disposition. *See id.*, 57 F.2d at 673 ("[T]he order of confirmation was correct, unless the court abused its discretion in not postponing action on the motion to confirm . . . *If confirmation did not preclude the appellant from thereafter moving to vacate the award, there was obviously no prejudicial abuse of discretion in entering the order of confirmation.* The District Court thought such a motion could still be made. With this we cannot agree.") (emphasis added). Moreover, the Second Circuit Court of Appeals has described its conclusion in *The Hartbridge* as a holding. *See Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2nd Cir. 1984) ("On appeal [in *The Hartbridge*], we . . . held that one party's motion to confirm an arbitration award imposes on the other party an obligation to move to vacate if he intends to do so.") (emphasis added). Second, the Hamm parties argue that *The Hartbridge* holding on which we rely has been "mostly ignored or rejected." However, this Court has favorably cited related aspects of *The Hartbridge*; the Second Circuit Court of

(Continued on following page)

concurs that a motion to vacate, to modify, or to correct an arbitration award must be filed before a judgment confirming the award is entered. *See Warren*, 669 P.2d at 847-48; *see also Clearwater*, 67 Wash. App. at 315, 835 P.2d at 263. *But see Federated Servs. Ins. Co. v. Estate of Norberg*, 101 Wash. App. 119, 123, 4 P.3d 844, 847 (Wash. App. 2000); *Martin*, 66 Wash. App. at 373-74, 832 P.2d at 120. Once the arbitration award has been confirmed without challenge and final judgment has been rendered thereon, "the award can be vacated only if the judgment can be [vacated], and to vacate the judgment an adequate excuse must be shown for not having presented objections to the award when the motion to confirm was heard." *The Hartbridge*, 57 F.2d at 673; *Clearwater*, 67 Wash. App. at 315,

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Appeals, in *Florasynth*, itself has since noted *The Hartbridge's* holding and did not, contrary to the Hamm parties' assertion, reject any holdings of that case; and even courts that have held contrary to *The Hartbridge* have failed to mention that opinion. From our research, it simply appears that the timing issue itself has rarely surfaced (as demonstrated by the extremely limited authority on the matter, which authority is fairly evenly split), rather than that courts have universally rejected *The Hartbridge's* conclusion. Third, the Hamm parties argue that the authority on which *The Hartbridge* court relied did not support its conclusion. We disagree that this authority did not support *The Hartbridge* court's holding. *See Gaines v. Clark*, 23 Minn. 64, 66 (1876) ("If they had any reason to urge why the award should not stand, they had an opportunity to present it, and it was their duty to present it, when the application to confirm and for judgment was made; and as they failed to do so, without any excuse for such failure, they ought not to be heard after the judgment."); *Brace v. Stacy*, 56 Wis. 148, 150, 14 N.W. 51, 52 (Wis. 1882) ("We are clearly of the opinion that the [arbitration] statute contemplates that all motions to vacate or modify the award must be made before the same is confirmed, and judgment entered thereon."). In any event, we believe that the holding of *The Hartbridge is* required in Texas, as explained elsewhere in our opinion, both by statutory language and common sense.

835 P.2d at 263 ("Although we recognize that there may be situations where [filing a motion to vacate] is not possible [at the time that a motion to confirm is filed], we have no way of knowing whether such a situation was present here.").

Under Texas law, we believe that the result reached in *The Hartbridge* is necessitated by *C.L. Winter*, in which this Court held that one must assert a motion to vacate, to modify, or to correct an arbitration award when a motion to confirm is filed, regardless of whether the TAA's 90-day period to challenge the award has expired. *See id.*, 886 S.W.2d at 521. Otherwise, our holding in *C.L. Winter* has no teeth: the requirement that one bring challenges to the arbitration award when a motion to confirm is filed means nothing if one may ignore that requirement with impunity and file a motion to vacate post-judgment, with no reasonable explanation for the delay.

By post-submission letter briefing, the Hamm parties rely on two opinions from the first division of the Washington court of appeals, in which that court held contrary to our holding today. *See Martin*, 66 Wash. App. at 373-74, 832 P.2d at 120; *see also Estate of Norberg*, 101 Wash. App. at 123, 4 P.3d at 847.[7] We respectfully decline to follow

[7] We note, however, that the same division of this court has at least once indicated that it might reach a contrary conclusion. *See Clearwater v. Skyline Constr. Co.*, 67 Wash. App. 305, 315, 835 P.2d 257, 263 (Wash. App. 1992, rev. denied) (regarding statutory three-month period in which to move to vacate arbitration award, stating, "This could be read to mean that 3 months is the *maximum* period in which a motion to vacate may be filed, not that the 3-month period is available in every situation. Generally, when a motion to confirm an arbitration award is filed within the 3-month period, the motion to vacate should also be brought at that time so that the two motions can be heard together.") (citations omitted; emphasis in original).

these opinions. In *Martin*, for example, the court held, based on what it interpreted to be conflicting statutory provisions that did not expressly speak to this issue, that one could move to vacate, to modify, or to amend an arbitration award for the first time after judgment confirming the award, provided that one did so within the statutory period. *Id.*, 66 Wash. App. at 373-74, 832 P.2d at 120. However, the *Martin* court's basis for this holding was that, "[i]n the absence of any provision explicitly providing that a party's rights . . . are limited by the entry of an order confirming the judgment . . . , we must conclude that the motion to vacate the judgment here was permissible . . . ," frankly acknowledging that "we have no basis for understanding what the Legislature's intentions were in establishing this particular statutory scheme [concerning the time for filing a motion to vacate]" and concluding that it was thus "constrained to interpret the statute as we have." *Id.*, 66 Wash. App. at 374, 374 n.4, 832 P.2d at 120, 120 n.4. *Martin* was also not a unanimous decision: two justices concurred, expressly disagreeing with the cited holding, and the majority even acknowledged that "the concurrence makes an excellent point concerning the inconsistencies among the various provisions of the statute." *Id.*, 66 Wash. App. at 374 n.4, 832 P.2d at 120 n.4; *see id.*, 66 Wash. App. at 377-80, 832 P.2d at 122-23 (Forrest, J., concurring, joined by Webster, A.C.J.). The *Estate of Norberg* court merely relied on *Martin*. *See* 101 Wash. App. at 123, 4 P.3d at 847.

We respectfully disagree with *Martin* and *Estate of Norberg*. First, for the reasons detailed above, we conclude that the FAA, and especially the TAA, imply a due order of consideration. Second, and also as discussed above, we

agree instead with the concerns that Justice Forrest raised in his concurring opinion in *Martin*:

> An arbitration award that is confirmed pursuant to [WASH. STAT. ANN. art. 7.04.150] is entered as a judgment of the court and "has the same force and effect, in all respects as, and is subject to all the provisions of law relating to" any other civil judgment. *The majority rule creates a judgment unlike any other in that it creates the anomaly of permitting, in effect, an appeal from a judgment more than 30 days after it has become final. After confirmation of the award, not only is the judgment creditor entitled to institute garnishment or execution proceedings but third parties, such as title companies and credit bureaus, are entitled to rely on the unappealed judgment. I find that the majority's result is inconsistent with the policy of the finality and integrity of judgments.*
>
> I see no reason to believe that the Legislature intended this unique exception to the normal rules governing the modification and amendment of judgments. Indeed, it is arguable, although not argued, that the majority's interpretation of [WASH. STAT. ANN. art. 7.04.160] results in an encroachment on the rule making authority of the Supreme Court. As interpreted it is, if not in conflict with, at least inconsistent with the civil rules as to judgments including: . . . new trial, reconsideration and amendment of judgments, . . . relief from judgment or order, and . . . time allowed to file notice. Such a result is not required by the language of the statute and should be avoided.

Id., 66 Wash. App. at 378-79, 832 P.2d at 123 (Forrest, J., concurring) (citations and footnotes omitted). We further

agree with the reasoning given by the Utah Supreme Court in reaching the conclusion that we do today:

> This construction is further confirmed by the provision directing entry of a conforming judgment or decree upon granting of an order "confirming, modifying, correcting or vacating an award," . . . , since that direction apparently contemplates that the court would consider such motions together rather than in succession. *Otherwise, the procedures, hearings, and action of the court in the motion to confirm could be held for naught and the whole process repeated. We do not readily infer a legislative intent to squander scarce judicial time in this manner.* . . . This construction facilitates the limited scope of review and the considerations of finality sought to be served by our policies on judicial review of arbitration awards.

Warren, 669 P.2d at 848 (emphasis added). This reasoning applies in Texas because here, as elsewhere, (1) the bases for reviewing an arbitration award are limited;[8] (2) the statute provides for expedited consideration of motions to confirm, to vacate, to modify, and to correct an arbitration award;[9] and (3) parties generally agree to arbitrate for the benefit of a speedy, final resolution of their dispute.[10] The Texas policy of expediting arbitration matters is not promoted by allowing a party to seek a "do-over," at a later

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[8] *See CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 245 (Tex. 2002).

[9] *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 430 (Tex. App. – Dallas 2004, no pet.); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 171.093 (Vernon 2005).

[10] *See Porter & Clements, L.L.P. v. Stone*, 935 S.W.2d 217, 221 (Tex. App. – Houston [1st Dist.] 1996, no writ).

date, of an award that has already been confirmed, that has been made final and enforceable by statute, and that could have been challenged on the same grounds before confirmation.

3. An Analogy

Because a statute makes a judgment confirming an arbitration award final and enforceable like any other judgment, our conclusion is further supported by analogous authority concerning affirmative defenses. An affirmative defense "seeks to establish an independent reason that the plaintiff should not recover" and is "thus [a defense] of avoidance, rather than a defense in denial"; that is, it is a defense of confession and avoidance. *In re C.M.*, 996 S.W.2d 269, 270 (Tex. App. – Houston [1st Dist.] 1999, no pet.); *Great Am. Prods. v. Permabond Int'l*, 94 S.W.3d 675, 683 (Tex. App. – Austin 2002, pet. denied). The statutory grounds for vacating, modifying, or correcting an arbitration award under either statute are in the nature of affirmative defenses because the party asserting these grounds implicitly *confesses* the existence of an arbitration award, but nonetheless seeks to *avoid* its effect by asserting an independent reason that the award should not be enforced. Like Rule of Civil Procedure 94,[11] which expressly requires pre-judgment pleading of affirmative defenses and "matter[s] constituting an avoidance" in other contexts, the FAA and TAA also contemplate (as discussed above) a due order of pleading with respect to motions to confirm, to vacate, to modify, or to correct, requiring a party challenging an award to raise its challenge before final judgment.

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[11] *See* TEX. R. CIV. P. 94.

This requirement makes sense given that the statutory grounds for vacatur, modification, and correction are matters – like those governed, by analogy, by rule 94 – of confession and avoidance.

An affirmative defense that is not pleaded or proved and on which findings are not obtained is waived and cannot be preserved by raising the affirmative defense for the first time in a motion for new trial. *In re C.M.*, 996 S.W.2d at 270; *Tien Tao Ass'n, Inc. v. Kingsbridge Park Cmty. Ass'n*, 953 S.W.2d 525, 532 (Tex. App. – Houston [1st Dist.] 1997, no pet.); *see Glover v. State*, 346 S.W.2d 121, 122 (Tex. Crim. App. 1961) ("A litigant is not permitted during a trial on the merits to remain silent as to affirmative defenses known to him, and then when an adverse result is reached, on motion for new trial complain because of his own neglect."); TEX. R. CIV. P. 94. Likewise, a trial court cannot abuse its discretion in overruling a motion for new trial raising an untimely affirmative defense. *Cf. id.* By analogy, then, a party that moves to vacate, to modify, or to correct an arbitration award, and adduces evidence in support, only *after* the award has been confirmed and final judgment rendered has waived that challenge – or, at least, a trial court does not abuse its discretion if it overrules such a post judgment motion. *Cf. In re C.M.*, 996 S.W.2d at 270.

This analogy to the law of affirmative defenses is particularly appropriate given that both the FAA and the TAA contemplate that a judgment confirming (or modifying or correcting) an arbitration award is final and enforceable like any other. *See* 9 U.S.C.S. § 13; TEX. CIV. PRAC. & REM. CODE ANN. § 171.092(a). If a judgment confirming an arbitration award is final like any other, then, as it is required to do with any other judgment, a

party must raise (and prove, if evidence is necessary) its confession-and-avoidance defenses before judgment.

4. Application of the Above Law to the Facts

Here, the record does not show that the Hamm parties challenged the arbitration award on the merits until after the award was confirmed and final judgment rendered. In its written response to the Hamm parties' motion to vacate or to modify, Millennium argued, citing *The Hartbridge* and *C.L. Winter,* that the Hamm parties had filed their motion too late and that the motion should be overruled for that reason. We agree with this proposition. A motion to vacate, to modify, or to correct an arbitration award must be raised or considered before or simultaneously with a motion to confirm the award. *See The Hartbridge,* 57 F.2d at 673; *Warren,* 669 P.2d at 847-48; *cf. C.L. Winter,* 886 S.W.2d at 521. The Hamm parties did not do this.

By post-submission letter briefing, the Hamm parties argue that their post-judgment motion to vacate was, in effect, rendered timely by the filing of their pre-judgment, unverified motion for continuance, which "inform[ed] the trial court of [their] intent to file a motion to vacate." Likewise, by post-submission amended brief,[12] the Hamm parties have assigned error to the trial court's denial of their continuance motion.

Case law indicates that, once an arbitration award has been confirmed without challenge and final judgment

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[12] In the interest of justice, we granted the Hamm parties' opposed, post-submission motion to amend their opening brief to assert a challenge to the denial of their continuance motion. *See* TEX. R. APP. P. 38.7.

has been rendered, "the award can be vacated only if the judgment can be [vacated], and to vacate the judgment an adequate excuse must be shown for not having presented objections to the award when the motion to confirm was heard." *The Hartbridge,* 57 F.2d at 673; *see Clearwater,* 67 Wash. App. at 315, 835 P.2d at 263. We review a ruling on a motion for continuance for abuse of discretion.[13] *See BMC*

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[13] By post-submission letter briefing, the Hamm parties assert that the mere filing of their motion for continuance sufficed to "preserve" their right to file a motion to vacate or to modify the award after the trial court confirmed the award. The Hamm parties' position would, in effect, avoid a determination of whether the trial court abused its discretion in denying their continuance motion: if all that one needs to do *before judgment* is merely to advise the trial court, by moving for more time to do so, that it will file a motion to vacate *after judgment,* then it is irrelevant whether the trial court abused its discretion in denying the continuance motion, and one may still move to vacate the award post judgment. This is not the law in Texas. *See Thomas James Assocs., Inc. v. Owens,* 1 S.W.3d 315, 322-23 (Tex. App. – Dallas 1999, no pet.) (holding that abuse-of-discretion standard applies in reviewing continuance motion made in conjunction with motions to confirm and to vacate arbitration award).

The Hamm parties' reliance on *The Hartbridge* for their position is unavailing because, in that case, as the court itself noted, the record revealed that the trial court had incorrectly assumed that it had *no* discretion to grant a continuance. *See id.* 57 F.2d at 673. Because the district court had declined to exercise *any* discretion on the motion to continue the confirmation hearing, the appellate court reversed the judgment and remanded for a new hearing. *See id.* That is not the case here. Moreover – and unlike here – the appellant in *The Hartbridge* must have assigned error on appeal to the denial of its continuance motion because the court considered that issue on the merits. *See id.* The Hamm parties also rely on *Paley Associates, Inc v. Universal Woolens, Inc.* in support of their position. 446 F. Supp. 212, 215-16 (S.D.N.Y. 1978). The *Paley* court interpreted a pre-confirmation continuance motion as an "objection to the confirmation of the arbitration award" and concluded that the movant had thereby "preserved its right to move later to vacate the confirmation. . . . " *Id.* In Texas, however, the appellate court looks to whether the trial court abused its

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Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 800 (Tex. 2002); *Thomas James Assocs., Inc. v. Owens,* 1 S.W.3d 315, 322 (Tex. App. – Dallas 1999, no pet.) (so holding with respect to continuance motion made in conjunction with motions to confirm and to vacate arbitration award). A trial court abuses its discretion when its decision is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law. *Marchand,* 83 S.W.2d at 800.

Here, the Hamm parties' continuance motion was not verified or accompanied by affidavit, contrary to rule. *See* TEX. R. CIV. P. 251 (" . . . nor shall any continuance be granted except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law.").[14] For this reason alone, the trial court did not abuse its discretion in overruling the continuance motion. *See Villegas v. Carter,* 711 S.W.2d 624, 626 (Tex. 1986) ("Generally, when

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discretion in denying a continuance motion for the reasons stated in that motion. *See Owens,* 1 S.W.3d at 322-23.

[14] Rule 251 applied to the Hamm parties' motion, even in this special statutory proceeding, because the TAA does not provide its own procedure for motions to continue consideration of a motion to confirm, to vacate, to modify, or to correct arbitration awards. *See* TEX. R. CIV. P. 2 ("These rules shall govern the procedure in the . . . district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated."); *id.* ("The 1943 and 1947 amendments make clear the inapplicability of the rules to special statutory proceedings, *insofar as statutory rules of procedure are specifically prescribed for such proceedings and differ from these rules.* These special proceedings appear under the following titles in the Revised Civil Statutes: . . . arbitration. . . . ") (commentary, 1966) (emphasis added); TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-.098 (Vernon 2005) (not providing for procedure for motions to continue consideration of motions to confirm, to vacate, to modify, or to correct arbitration awards).

movants fail to comply with TEX. R. CIV. P. 251's requirement that the motion for continuance be 'supported by affidavit,' we presume that the trial court did not abuse its discretion in denying the motion."); *cf. N. State Constr. Co. v. Banchero*, 63 Wash.2d 245, 248, 386 P.2d 625, 627 (1963) (holding that trial court did not abuse discretion in denying motion to continue hearing to confirm and to vacate arbitration award, when continuance was sought for preparation of statement of facts from arbitration proceeding, when continuance motion did not comply with statute requiring such motion to be supported by affidavit showing materiality of sought-after evidence and due diligence).

Additionally, their continuance motion neither explained on which statutory grounds for vacating or modifying they might rely,[15] nor explained how the arbitration materials for which they needed the continuance were relevant and material to those grounds – even though the counsel who filed the continuance motion also represented the Hamm parties at arbitration. *Cf. Banchero*, 63 Wash.2d at 248, 386 P.2d at 627 ("Appellants were in a good position to comply with all of these requirements [of supporting their continuance motion with affidavit showing materiality of sought-after evidence, among other matters] as they were, or should have been, familiar with the evidence presented to the board of arbitrators."). This is important because (1) the trial court already had the arbitration agreement, Millennium's arbitration demand filed with the American Arbitration Association, and the

[15] The motion cited only generally the TAA's provisions concerning vacating and modifying or correcting arbitration awards, arguing simply that "there are substantial factual and legal errors in the award," without further specificity.

arbitration award before it, by virtue of previously filed pleadings and motions, and (2) some statutory grounds for vacating or modifying arbitration awards based on "legal errors" (as the Hamm parties alleged in part) do not *necessarily* require the filing of more than these documents. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(3)(A) (providing for vacating award if arbitrators exceeded their authority); *id.*, § 171.091(a)(1)-(3) (providing for modifying or correcting award if it contains evident miscalculation of numbers or evident mistake in description of person, thing, or property to which award refers; arbitrators made award with respect to matter not submitted to them and award may be corrected without affecting decision's merits; or award's form is imperfect in manner not affecting merits); *see Crossmark, Inc. v. Hazar,* 124 S.W.3d 422, 430 (Tex. App. – Dallas 2004, no pet.) ("[A]pplications to confirm or vacate an arbitration award should be decided as other motions in civil cases; *on* notice and *an evidentiary hearing if necessary*.") (emphasis added).

Moreover, we have no idea what, if anything, was discussed concerning the continuance motion at the September 5 hearing because we have no record of that hearing. Neither did the Hamm parties ask the court to revisit its continuance ruling at the time that they filed their post judgment motion to vacate the judgment and award or explain then why the record for which they sought a continuance was essential to the bases for their motion to vacate.[16]

[16] In fact, we note that the Hamm parties' motion to vacate urged, in the main, that the arbitrators had exceeded their authority under the arbitration agreements by interpreting the partnership agreements incorrectly and by committing errors of law in doing so. These grounds

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Given this record, we cannot say that the trial court abused its discretion in denying the Hamm parties' continuance motion.

5. The Record

Finally, even if we were to reach the merits of the Hamm parties' post-trial motion, it is not at all clear that we could consider the arbitration record and exhibits filed in support. First, the arbitration record and exhibits were not introduced into evidence at the post-judgment hearing; the Hamm parties did not expressly or specifically refer to them in their post-judgment motion to vacate or to modify; nothing shows that the trial court considered the arbitration record and exhibits at the hearing on the Hamm parties' post-judgment motion; and the arbitration materials, like the post-judgment motion in support of which they were produced, were not filed before final judgment. Given these circumstances, nothing shows that the trial court considered the arbitration record and exhibits when it ruled on the Hamm parties' post-judgment motion. *See State v. One (1) 1986 Nissan Auto. V.I.N. JN1HZ14S1GX162301,* 792 S.W.2d 577, 579 (Tex. App. – El Paso 1990, no writ) (holding that letter that was included in clerk's record, but that was not admitted into evidence and that did not appear to have been considered by trial court, could not be considered on appeal), *overruled on other grounds sub. nom State v. $435,000,* 842 S.W.2d 642 (Tex. 1992).[17] Indeed, the trial court would not have abused

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did not necessarily require the entire arbitration record, which was the reason that the Hamm parties had earlier sought a continuance.

[17] *Compare Ahmed v. Shimi Ventures, L.P.*, 99 S.W.3d 682, 684 n.2 (Tex. App. – Houston [1st Dist.] 2003, no pet.) ("Here, the trial court

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its discretion in overruling the Hamm parties' post-judgment motion even without first considering the arbitration record and exhibits because the Hamm parties had untimely filed both that motion and their supporting documentation.[18] Simply put, nothing requires a court to consider materials relevant to vacating an arbitration award when those materials are filed along with an untimely motion to vacate and insufficient explanation is offered for the delay. Second, the arbitration materials were not before the trial court at the time that it confirmed the award and rendered final judgment – in effect, the only ruling that we may review on the merits because the motion to vacate or to modify was untimely – and we

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announced during the hearing that it could base its decision on the exhibits and testimony from the hearing and also on 'affidavits filed with the petition' and on 'evidence [sic] provided in [Ahmed's] answer.' No one objected to this stated procedure. The trial court was the fact finder; therefore, its declaring during the evidentiary hearing that it could consider the affidavits was tantamount to its having – rightly or wrongly – admitted those affidavits into evidence. Ahmed's counsel, who now argues that the affidavits did not constitute evidence, implicitly acquiesced in this procedure below. . . . "). It is into this distinguishable category that some of the authority on which the Hamm parties rely falls. *See Air Routing Int'l Corp. (Canada), ARG v. Brittania Airways, Ltd.*, 150 S.W.3d 682, 697 n.15 (Tex. App. – Houston [14th Dist.] 2004, no pet.) (indicating that court took judicial notice of case-file contents); *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App. – Houston [1st Dist.] 1993, writ denied) (indicating that trial court wrote "inspected by court" on envelope containing documents in its file).

[18] For this reason, which did not exist in the cases that the Hamm parties cite, we cannot simply presume that the trial court took judicial notice of its file. *See Attorney Gen'l of Tex. v. Duncan*, 929 S.W.2d 567, 571 (Tex. App. – Fort Worth 1996, no writ) ("[T]he trial court may take judicial notice of its file at any stage of proceedings and is presumed to have done so with or without a request from a party."); *Holley*, 864 S.W.2d at 706 ("We presume the trial court took judicial notice of its files.").

may generally not evaluate a trial court's rulings based on materials that were not before it at the time that it ruled. *See, e.g., Methodist Hosps. of Dallas v. Tall*, 972 S.W.2d 894, 898 (Tex. App. – Corpus Christi 1998, no pet.) ("It is axiomatic that an appellate court reviews actions of a trial court based on the materials before the trial court at the time it acted.").

Conclusion

The trial court had no discretion but to confirm the arbitration award if the Hamm parties did not file a motion to vacate or to modify (or otherwise challenge in any way) the award before the ruling on Millennium's motion to confirm. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.087. The Hamm parties did not do so. The trial court was entitled summarily to deny the Hamm parties' untimely post-judgment motion to vacate or to modify and did not have to consider the untimely materials filed in support of that motion. For these reasons and the reasons stated above, we overrule each of the Hamm parties' issues and affirm the judgment of the trial court.

Tim Taft
Justice

Panel consists of Justices Taft, Alcala, and Higley.

[SEAL]

Court of Appeals

First District of Texas

JUDGMENT

W. DOW HAMM III and DOW HAMM III CORPORATION, APPELLANTS	Appeal from the 61st District Court of Harris County, Texas. (Tr. Ct. No. 2003-13955.) Panel consists of Justices Taft, Alcala, and Higley. Opinion delivered by Justice Taft.
NO. 01-03-01209-CV V.	
MILLENNIUM INCOME FUND, L.L.C., APPELLEE	

The cause heard today by the Court is an appeal from the judgment signed by the court below on September 5, 2003. After submitting the cause and inspecting the record of the court below, it is the opinion of this Court that there was no reversible error in the judgment. It is, therefore, **CONSIDERED**, **ADJUDGED**, and **ORDERED** that the judgment of the court below be, in all things, **affirmed**.

It is further **ORDERED** that appellants, W. DOW HAMM III and DOW HAMM III CORPORATION, jointly and severally, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Taft, Alcala, and Higley.

Judgment rendered July 28, 2005

NO. 2003-13955

MILLENNIUM INCOME FUND, L.L.C.	§	IN THE DISTRICT COURT OF
	§	
vs.	§	HARRIS COUNTY, TEXAS
W. DOW HAMM, III and W. DOW HAMM, III CORPORATION	§	61ST JUDICIAL DISTRICT

Judgment Confirming Award of Arbitrator

(Filed Sep. 5, 2003)

This matter was submitted to arbitration under the rules of the American Arbitration Association (the "Association"), the full names of the parties being Millennium Income Fund, L.L.C., Plaintiff and Claimant; and W. Dow Hamm, III and W. Dow Hamm, III Corporation, Defendants and Respondents. The matters litigated during the Arbitration proceeding related to the following Partnerships: HM College Station, L.P.; HM Clear Lake, L.P.; HM Austin Northwest, LP; HM Compaq Center Drive, LP; HM T Compaq Center Drive, LP; HM C Compaq Center Drive, L.P.; HM Homewood, L.P. (the "Partnerships"). An evidentiary hearing was conducted starting July 14, 2003 and concluding July 17, 2003, and the matter was declared closed on July 31, 2003.

On August 25, 2003, the Association transmitted to the parties the Award of Arbitrator (the "Award"). A copy of the Award is attached as Exhibit A and incorporated by reference here for all purposes.

This matter is now before the Court on Plaintiff's Application to Confirm Award of Arbitrator. Having considered the Application, the Court in all things confirms the

Award. It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiff shall have judgment from and against Defendants as follows:

1. W. Dow Hamm, III shall pay the following amounts to the Partnerships listed as damages for improper loan guaranty fee payments:

A. HM Austin Northwest, L.P. the sum of $100,109.72

B. HM C Compaq Center Drive, L.P. the sum of $93,489.98

C. HM T Compaq Center Drive, L.P. the sum of $74,668.92

D. HM Homewood, L.P. the sum of $96,555.22

2. W. Dow Hamm, III Corporation shall pay the following amounts to the Partnerships listed as damages for improper asset management fee payments:

A. HM Clear Lake, L.P. the sum of $32,889.94

B. HM College Station, L.P. the sum of $32,021.22

C. HM Austin Northwest, L.P. the sum of $28,364.72

D. HM C Compaq Center Drive, L.P. the sum of $56,454.02

E. HM T Compaq Center Drive, L.P. the sum of $40,568.94

F. HM Homewood, L.P. the sum of $31,625.50

3. The books and records of HM Austin Northwest, L.P. shall be revised to delete the payment of $700,000 to

Compass Bank in reduction of debt for purposes of the calculation of the Priority Return only.

4. W. Dow Hamm, III and W. Dow Hamm, III Corporation shall pay to Millennium Income Fund, L.L.C., jointly and severally, the sum of $700,000.

5. W. Dow Hamm, III and W. Dow Hamm, III Corporation shall hold a right to payment of the same character as an Operating Deficit Contribution Return respecting HM Austin Northwest, L.P. to the extent only that the sums awarded in paragraph 4 above are paid.

6. W. Dow Hamm, III Corporation shall pay the following amounts to the Partnerships listed, as damages for improper professional fee payments:

A. HM Clear Lake, L.P. the sum of $5,199.72

B. HM College Station, L.P. the sum of $5,387.55

C. HM Austin Northwest, L.P. the sum of $5,302.12

D. HM C Compaq Center Drive, L.P. the sum of $4,823.05

E. HM T Compaq Center Drive, L.P. the sum of $5,374.77

F. HM Homewood, L.P. the sum of $5,417.12

7. W. Dow Hamm, III and W. Dow Hamm, III Corporation shall pay to Millennium Income Fund, L.L.C., jointly and severally, the sum of $150,000.00 as exemplary damages.

8. Scott C. Mitchell, CPA, 820 Gessner, Suite 1380, Houston, Texas 77024, telephone 713.827.7500 (the

"Accountant") is appointed to perform an accounting of the Partnerships in accordance with the terms of the Award. The Accountant shall conduct the accounting at the cost of the Partnerships and shall do so without the necessity of posting bond. The accounting shall address the sums awarded to the Partnerships herein, correction of the Priority Return calculations in accordance with the Award (including a determination of the Project Cost in each instance), the capital accounts of the Partners, and will generally review the financial records of the Partnerships to the extent deemed appropriate by the Accountant.

9. Defendants shall immediately surrender all original accounting information and Partnerships records to the Accountant and shall execute all necessary authorizations for the release of Partnership information by third parties immediately upon the request of the Accountant. The accounting shall be completed as soon as reasonably practicable after the date hereof.

10. The Limited Partners of each Partnership are afforded a period of ninety (90) days following the date of this Award, during which the Partnerships shall be administered by the Accountant, serving in the role of receiver without bond, to reach an agreement in writing for the continuation of the Partnerships and the selection of a new General Partner.

11. Hamm Corporation is expelled as General Partner of each of the Partnerships. A replacement General Partner shall be selected as set forth above or if one is not selected, then the Accountant shall wind up the Partnerships and distribute their assets in accordance with the terms of the operative partnership agreements.

12. W. Dow Hamm, III and W. Dow Hamm, III Corporation are permanently enjoined as follows:

A. Hamm Corporation and Hamm shall not cause the funds or assets of any of the Partnerships to be transferred to any other Partnership for any purpose or by any means;

B. Hamm Corporation and Hamm shall make no payments of asset management fees or any sums in consideration of any services rendered by either of them for or on behalf of the Partnerships;

C. Hamm Corporation and Hamm shall make no payments of loan guaranty fees or any sums in consideration of any pledge made by either of them for or on behalf of the Partnerships; and

D. Hamm Corporation and Hamm shall not contract with or make any payment of Partnership funds to any professional for services rendered on behalf of the Partnerships except as ordered herein or agreed by all of the Limited Partners.

13. The sums awarded herein shall be paid on or before September 24, 2003. All sums not paid within 30 days following the date of this award shall bear interest at the rate of 10% per annum.

14. The administrative fees and expenses of the Association shall be borne equally by the parties as set forth in the Award.

15. All costs of this lawsuit are taxed against Defendants, jointly and severally.

16. All claims not expressly granted herein are denied.

17. Plaintiff shall have all writs necessary to satisfy and enforce the terms of this judgment.

18. This is a final judgment.

SIGNED: September 5th, 2003.

/s/ John Donovan
JUDGE PRESIDING

EXHIBIT A

American Arbitration Association

Case No. 70 180 00300 03

MILLENNIUM INCOME FUND, L.L.C.

vs.

W. DOW HAMM, III CORPORATION AND W. DOW HAMM, III

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, was designated in accordance with the arbitration agreements entered into by the above-named parties, and dated December, 1997, August 28, 1998, February 5, 1999, February 22, 1999 and March 2, 1999. Having been duly sworn, I heard the proofs and allegations of the parties in evidentiary hearings held on July 14-17, 2003, and I received post-hearing written submissions filed on July 31, 2003. The hearings in this matter were declared closed on July 31, 2003. The agreements that are the subject of these proceedings require that the Award of the Arbitrator shall

include findings of fact and conclusions of law; therefore, the discussion below constitutes the findings and conclusions of the Arbitrator.[1] On the basis of the findings and conclusions set forth below, I do hereby AWARD as follows:

Background

This is a dispute between members of seven (7) Texas limited partnerships, named HM Clear Lake, L.P., HM College Station, L.P., HM Compaq Center Drive, L.P., HM Austin Northwest, L.P., HMC Compaq Center Drive, L.P., HMT Compaq Center Drive, L.P. and HM Homewood, L.P., collectively referred to hereinafter as "The Partnerships" for convenience. With the exception of the entity known as HM Compaq Center Drive, L.P. (as distinguished from HMC Compaq Center Drive, L.P. and HMT Compaq Center Drive, L.P.), each partnership owns a hotel business. HM Compaq Center Drive, L.P. is the owner of an unimproved tract.

The Claimant, Millennium Income Fund, L.L.C. ("Millennium"), is a Limited Partner in each of the Partnerships, as is one of the Respondents, W. Dow Hamm, III, an individual ("Hamm"). Jonathan Brinsden, who is not a party to these proceedings, is also a Limited Partner in four of the seven Partnerships. The remaining party, Respondent W. Dow Hamm, III Corporation ("Hamm Corporation"), is the General Partner of each of the Partnerships.

[1] The findings of fact and conclusions of law are not separately identified as such. Some statements are mixed statements of law and fact.

Millennium's claims against Hamm Corporation and Hamm are largely brought in behalf of the Partnerships to recover funds alleged to belong to the Partnerships.[2] Hamm Corporation and Hamm have counter-claimed for recovery in behalf of themselves and in behalf of the Partnerships. Millennium also seeks an accounting, to have Hamm Corporation removed as General Partner, to have the Partnerships dissolved and for a permanent injunction.

The Contracts

Each of the Partnerships is the subject of a separate written Limited Partnership Agreement. For convenience, the Limited Partnership Agreements may sometimes hereinafter be referred to simply as the "Agreements". All of the Agreements are substantially similar in their terms and conditions, inasmuch as they are all based upon essentially the same form of agreement, which was extensively negotiated between the parties prior to the execution of the first agreement, which related to HM College Station L.P., and was executed in December 1997. The Limited Partnership Agreements are unambiguous in their terms, even though the parties may legitimately disagree as to the definitions of certain terms used within the documents and the application of the written terms of the Agreements to the facts.

Relevant sections of the Limited Partnership Agreements will be discussed below as appropriate.

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[2] Article 10 of the Act permits a limited partner to bring an action for the benefit of a limited partnership.

Each of the hotels belonging to the respective Partnerships is currently being managed by a subsidiary of the Marriott Corporation under the terms of written Management Agreements. For convenience, the entities with whom the Partnerships have management agreements will hereinafter be referred to collectively as "Marriott".

The Disputes

This dispute has arisen because some of the hotel properties have failed to financially perform to the parties' expectations. A number of explanations have been put forth to explain the unfortunate fiscal circumstances, all of which are largely irrelevant here however, Hamm and Hamm Corporation allege that misfeasance on the part of Marriott is at least partially to blame.

Whatever the cause of the financial difficulties experienced by the Partnerships, Millennium has alleged the activities of Hamm and Hamm Corporation violate the express terms of the respective Limited Partnership Agreements, as well as the fiduciary duties of the general partner to its limited partners. Those alleged defalcations fall into several categories, discussed below.

Hamm Corporation and Hamm assert that Millennium has conspired with Jonathan Brinsden and others to "squeeze out" Hamm Corporation by breaching the Agreements and its duties to the Partnerships and its fellow Partners. Hamm Corporation and Hamm further allege that Millennium breached the Agreements by refusing their requests for the payment of asset management and loan guaranty fees.

Loan Guaranty Fees

Beginning in approximately April, 2002, Hamm asserted that, because the permanent financing for the Partnerships was additionally secured by his personal guaranty, a fee to compensate Hamm for this service to the Partnerships was customary and should be paid. The terms of the Limited Partnership Agreements do not provide for the payment of such fees. Nevertheless, and in spite of Millennium's refusal of its approval, Hamm Corporation made loan guaranty fee payments to Haman from the accounts of the Partnerships.

While Section 4.3 of each Agreement authorizes the General Partner (that is, Hamm Corporation) to generally manage the affairs of each partnership, including the payment of operating expenses, Section 4.2 expressly limits the authority of the General Partner to act without the express consent of all Limited Partners in a number of significant ways. Among those limitations is an express prohibition against the General Partner entering into any agreement on behalf of a Partnership with the General Partner itself or with an affiliate of the General Partner, absent the express approval of all Limited Partners.[3] The term "Affiliate" is defined in the Agreements, and there is no serious dispute that Hamm qualifies as an affiliate of Hamm Corporation.

Millennium did not consent to the payment of any loan guaranty fee by any of the Partnerships to Hamm. Brinsden testified that he likewise did not approve the payment of a guaranty fee. The Partnerships' agreement to pay the loan guaranty fees to Hamm is a type of agreement which

[3] See Agreement Section 4.2(i).

the General Partner was prohibited from entering into without the unanimous approval of the Limited Partners.

For its part, Hamm Corporation asserts that Hamm's guaranties of the obligations of the Partnerships were a condition imposed by the lender. No formal proposal was made to the Limited Partners of any Partnership (or to all of them collectively) for the payment of such fees and no meeting regarding the issue was called. Neither was the matter of a guaranty fee discussed or agreed upon at the time that a lender demand for Hamm's personal guaranty was made and before the loans were accepted by Hamm Corporation on behalf of the Partnerships. The Agreements provide that no Limited Partner (including-Hamm) shall be liable for Partnership debt (Sec. 3.6), and that the General Partner is responsible for arranging the Financing (Sec. 3.12). These provisions do not amount to a requirement that any partner must personally guarantee Partnership debt. Hamm would have been well within his rights to negotiate with Millennium and Brinsden the terms under which he would guarantee the debt before the loans were closed. Instead, Hamm simply requested Millennium's consent, at some time following the execution of the loan documents, for payment of a guaranty fee in monthly installments in an amount based upon the outstanding principal balances of the loans which Hamm had personally guaranteed.

Hamm and Hamm Corporation also say that the consent requirement in the Agreements violates the Texas Revised Limited Partnership Act, Tex. Rev. Civ. Statutes, Art. 6132a-1 (the "Act"), by placing in the hands of the Limited Partners the ability to manage the affairs of the Partnerships. Section 3.03(b) of the Act provides that certain actions by a limited partner shall not constitute "control of

the business" such as would expose the limited partner to personal liability to a third party. Among the enumerated exemptions is that listed under sub-heading (8)(G), which permits limited partners to exercise a right of approval of "a transaction or other matter involving an actual or potential conflict of interest." The clear purpose for this provision of the Act and for Section 4.2 of the Agreements is to safeguard against self dealing by the General Partner. The agreement of the General Partner to pay money to its sole shareholder and officer from Partnership funds is a transaction that implies at least a potential conflict of interest.

Hamm Corporation further asserts that the payment of this fee was a reasonable and necessary "operating cost" of the Partnerships. Payment of "operating costs of the Partnerships in an amount not in excess of $20,000.00 for each expenditure" is authorized under Agreement Section 4.3(b). The term "operating costs" is not expressly defined in the Agreements. Absent a specific definition contained within the instrument itself, the words used will be given the meaning that ordinary people of reasonable understanding would apply in similar circumstances. The objects and purposes intended to be accomplished by the agreement must also be considered and all terms used must be harmonized where possible to reach a coherent interpretation, and to avoid if possible rendering any clause meaningless. Here, the term "operating costs" means those expenses routinely expected to be encountered in the normal operation of a hotel owner's business where the day to day affairs of the hotel (i.e. taking reservations, cleaning rooms and the like) are assumed by another under a management agreement. To extend this broad definition to the payment of loan guaranty fees to an

affiliate of the General Partner stretches the point too far, for it would require the payment of an expense that ordinary business people would not routinely expect to encounter absent an express agreement, and would render the prohibition and shareholder review provided in Section 4.2(j) virtually meaningless.[4]

Finally, Hamm Corporation and Hamm asserted in Hamm's testimony that the guaranty fee is a cost of the financing, which is payable under Section 4.3(c) of the Agreements. The plain language of the Agreements does not support this contention. Section 4.3 allows the payment of all sums "owed in connection with the Construction Loan or the Financing"; in so doing, it allows payment of amounts required by the lender. A guaranty fee was not owed to the lender and a plain reading of the Agreements does not permit the "in connection with" wording to be so broadly interpreted as to create an obligation of the Partnership to a Limited Partner.

Hamm Corporation's payment of sums characterized as loan guaranty payments to Hamm violated the express terms of the Agreements. Such payments resulted in damage to the Partnerships in the aggregate sum of $364,823.84.

Asset Management Fees

At approximately the same time that Hamm Corporation requested the approval of Millennhnm to pay a loan

[4] The Agreements specifically limit the authority of the Arbitrator by prohibiting alteration of any rights or obligations of any party, and by prohibiting any change to the enforceability of any term of the Agreements.

guaranty fee to Hamm, it requested approval of the payment of an "asset management fee" to Hamm Corporation. This fee, in an amount equal to three per cent (3%) of the gross revenues of the Partnerships, was to compensate Hamm Corporation for its services in the management of the business affairs of the Partnerships.

No express provision allowing the payment of a management fee of any kind to the General Partner is found in any of the Agreements, nor in any other document submitted in evidence. Neither was any document submitted that establishes the basis for the 3% figure. Hamm Corporation paid itself asset management fees from the accounts of the Partnerships.

Hamm Corporation justifies payment of asset management fees through testimony to the effect that, because of the alleged misdeeds of Marriott and unexpected reversals in the market, Hamm Corporation has been required to expend a substantially greater effort in behalf of the Partnerships than was initially contemplated by the parties. The parol evidence of the alleged intent of the parties that management fees were to be allowed was presented through the testimony of Hamm and of Millennium's former President, Mary Beth Racca. Ms. Racca testified that the compensation of the General Partner was discussed before the Agreements were executed and that the parties contemplated an arrangement for reimbursement of the actual costs incurred by the General Partner.[5]

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[5] At pp. 721-722, Ms. Racca testified: "And we talked about at one point the general partner, basically its function was to, again, carry out and manage the affairs of the partnership, and there's staff that is involved in that, office expenses and what have you. . . . – and this is

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The Agreements allow for the reimbursement of routine and ordinary costs, and this is the provision apparently referenced by Ms. Racca in her testimony. A fair reading of the provision allowing such reimbursement (and the testimony of Ms. Racca) requires that reimbursement must be for the amounts actually expended. For his part, Mr. Hamm did not unequivocally testify that there was an express agreement for on-going payments to the General Partner for its services, or that the 3% amount was expressly agreed. Therefore, even assuming that it is appropriate to consider parol evidence, there is no justification for the payment of a fee equal to three per cent (3%) of the revenues of the Partnerships.[6]

Parol evidence of the intentions of the parties to a contract is admitted only in circumstances where there is ambiguity in the meaning of the contract in question. Here, there is no need to resort to parol evidence, for the provisions of the Agreements are unambiguous. It is nevertheless impractical for the Arbitrator to attempt to look back into the considerations that passed between the parties at the time the Agreements were signed, as there were obviously many types of consideration that were negotiated and exchanged.[7] Also, those provisions are consistent with at

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what I told him, I said, 'I think that what's most reasonable and acceptable to us is something on a cost-type basis, a cost allocation.'"

[6] The evidence submitted by Hamm Corporation states that such fees vary widely, based on a number of factors. See Affidavit of John M. Keeling.

[7] The General Partner was paid a development fee, received an ownership interest in the assets of the Partnerships and certain rights to receive distributions of income. The value of this consideration was and remains highly uncertain, and contingent upon future events. There is no practical way to evaluate the worth of the consideration that passed between the General Partner and the Limited Partners. As

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least a portion of the more credible parol testimony offered.

As discussed above, the Agreements provide that the General Partner is prohibited from entering into "any contract or agreement with the General Partner or an Affiliate of the General Partner" without the consent of all Limited Partners. Here again Hamm Corporation asserts that compensation for its services in managing the operations of the Partnerships is customary and constitutes an ordinary operating cost. For the reasons set forth above under the preceding heading, this argument fails.

Hamm Corporation's evidence also implies a kind of quantum meruit claim for compensation, through evidence that a third party provider of management services to the Partnerships would command a fee in the approximate amount of $10,000 per month. Quantum meruit is an equitable, quasi-contract type of claim, and is ordinarily precluded by the existence of a written agreement. Such compensation would be allowed only if the services for which quantum meruit is sought were outside the scope of the writing. Here, the duties imposed on Hamm Corporation under the Agreements are the same services for which it seeks compensation outside of the Agreements. The quantum meruit claim is denied.

The approval of the Limited Partners was required in order for Hamm Corporation to be entitled to receive management fees, and this approval was not received.

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these exchanges were negotiated at arms length, they cannot be altered on the strength of parol evidence, assuming that such evidence clearly indicated a different intent than that which is expressed in writing.

Nevertheless, Hamm Corporation paid to itself the aggregate amount of $221,924.34 as asset management fees from the funds of the Partnerships. The disbursement of these amounts was wrongful.

Different, however, is the matter of Hamm Corporation's rights to reimbursement of its actual costs in administering the affairs of the Partnerships. As Ms. Racca pointed out, expenses are necessarily incurred by the General Partner in conducting the business of the Partnerships, and the provisions of Sections 4.3(b) and 4.5(a) are consistent with this view. No complaint was raised to any expenditure of the Partnerships that was identified by either side as being "operating costs" except as discussed herein. Hamm Corporation has not asserted a claim for reimbursement of any out-of-pocket costs not already paid. Therefore, any claim for reimbursement for any expenditure not expressly awarded herein is denied.

Intra-Partnership Loans

Some of the Partnership hotels experienced better financial success than certain others. In the latter part of 2000 it became apparent to Hamm that the HMC Compaq Center Drive, L.P. ("HMC Compaq") and HMT Compaq Center Drive, L.P. ("HMT Compaq") properties would experience an income shortfall that could result in a default of their obligations. The matter was raised with Millennium, and an agreement was reached whereby undistributed monies due to Millennium from the HM College Station L.P. and HM Clear Lake, L.P. properties were distributed "on paper" to Millennium and then lent to HMC Compaq and HMT Compaq. The aggregate amount of these loans from Millennium was $700,000, and the

proceeds funded were used to reduce the debt of these Partnerships. These partnership loans were accomplished with the approval of Millennium.

In November 2001, another loan transaction took place wherein HM Austin Northwest, L.P. borrowed $50,000 from HM College Station, L.P. This loan was fully documented and approved by the Limited Partners.

In May, 2002, it again became apparent that HM Austin Northwest, L.P. was in financial distress and that it would be unable to make a required loan payment. Hamm Corporation accomplished a loan in the amount of $700,000.00 to HM Austin Northwest, L.P. from HMC Compaq and HMT Compaq. This Hamm Corporation did without the approval of Millennium; instead, Hamm Corporation informed Millennium that its loans to HMC Compaq and HMT Compaq had been "satisfied by advancing to HM Austin Northwest L.P. the proceeds" of the repayment of the prior loans from Millennium to HMC Compaq and HMT Compaq.

Millennium characterizes the transactions as being umapproved "intra-partnership"[8] loans from HMC Compaq and HMT Compaq to HM Austin Northwest, L.P. It rather appears that what occurred was that Hamm Corporation collected payment of the two Compaq loans (wherein Millennium was the payee) and advanced Millennium's money to HM Austin Northwest. Whatever characterization is applied in the circumstances, Hamm's activities were improper, and a breach of the fiduciary duty that Hamm Corporation owes to Millennium.

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[8] A more correct term is "Inter-Partnership".

The Agreements provide a means for the General Partner to call upon the Limited Partners to make additional contributions to the Partnerships.[9] Hamm Corporation never delivered any notices to the Limited Partners respecting the operating deficits experienced by HM Austin Northwest, L.P., nor did it make any request for the Limited Partners to make Operating Cash Deficit Contributions. Neither did Hamm Corporation request that Millennium make another loan to HM Austin Northwest, L.P., as it did in 2001. Hamm Corporation asserts that such notices would not have resulted in favorable action from Millennium, because Hamm had been told that Millennium would contribute no additional funds in support of the Partnerships. Nevertheless, as General Partner, Hamm Corporation's only recourse under the terms of the Agreements was to formally notify all Limited Partners of the need for additional contributions. Unilateral action of the kind taken by this fiduciary is unjustified under any exigency.

Because the monies advanced to HM Austin Northwest, L.P. belonged to Millennium, it has incurred damage in the amount of the "loans" to HM Austin Northwest, L.P., in the principal amount of $700,000.

Millennium claims that it has been additionally damaged as a result of the above-described transactions because they affect the calculation of the Priority Return that Millennium is entitled to receive per the terms of the Agreements. The Priority Return[10] is an amount that Millennium is entitled to receive in preference to all other

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[9] Agreement, Section 3.2.

[10] Agreement, Article 1, ¶ 46.

distributions to the Partners, which is based on the Project Cost, a term also defined in the Agreements.[11] By definition, the amount of the Priority Return is reduced by payments made by a given Partnership on its debt. Therefore, Millennium asserts, its Priority Return entitlement was wrongfully reduced to the extent that the unauthorized loan: (a) resulted from the payment of the original Millennium loans to HMC Compaq and HMT Compaq, thus reducing the debts of those Partnerships and reducing the Priority Return respecting those Partnerships and, (b) simultaneously reduced the Priority Return amount respecting HM Austin Northwest, L.P. because the money received by it was immediately used to pay Compass Bank on its loan to the Austin Partnership.

Millennium complains that the making of these "Intra-Partnership Loans" resulted in a type of impermissible double dipping.[12] One element of the alleged damage is that a reduction in the Priority Return results in an increase in the funds available to distribute according to the Sharing Ratios. However, there is nothing in the Agreements that would prohibit this accounting methodology, assuming that the Limited Partners approved the loans from which funds were generated. As discussed above, the loan to HM Austin Northwest L.P. was not authorized, either by the Limited Partners or by its de-facto maker, Millennium. Had the loans been authorized, the accounting employed by Hamm Corporation would be

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[11] Agreement, Article 1, ¶ 50.

[12] In theory, this practice of loaning funds from one partnership to another, and the consistent creation and reduction of debt, could be expertly manipulated to depress the Priority Return calculations indefinitely and perhaps reduce them to zero.

correct; however, because the loan to HM Austin Northwest, L.P., was improper, it would be just as inappropriate to allow Hamm Corporation and Hamm to profit as a result. The Priority Return calculation which takes into account the amount of the reduction of the debt of HM Austin, thereby reducing the associated Priority Return, should be reversed, and the Priority Return calculation based on amounts paid out of HMC Compaq and HMT Compaq shall remain as computed by Hamm Corporation.

Millennium also complains that the Priority Return calculations for some or all Partnerships are incorrect because Hamm Corporation has used the Project Budget figure, as opposed to the actual Project Cost, in arriving at the figure. This is a matter that requires investigation and, possibly, correction in the course of the accounting of the Partnerships.

Professional Fees

Millennium further complains that Hamm Corporation incurred and paid professional fees in behalf of the Partnerships to a variety of providers, which were not authorized by the *Limited* Partners, and that such activities constitute a breach of the Agreements and violations of Hamm Corporation's fiduciary duties. Agreement Section 4.2(g) prohibits the General Partner from "engag[ing] the services of attorneys, accountants, or other independent contractors" unless approval is given by the Limited Partners. It is undisputed that, during years 2001, 2002 and 2003, Hamm Corporation retained the services of Price Waterhouse Coopers ("PWC"); PKF Consulting; Kahanek, Frank & Associates; Fulbright & Jaworski; Jarrard Law Group, Adams Resources/Louise Upshaw

McClenny; and Robert Gerbin. In each instance, it is alleged that the professionals were retained in good faith for the benefit of the Partnerships. In the main, the professionals were retained to assist in evaluating and pursuing the Partnerships' claims against Marriott.

In dispute is whether most of the engagements were, in fact approved, and whether Millennium is estopped from complaining of the expenditures. There is no disagreement that Millennium never approved the retention of Robert Gerbin as a consultant. Millennium also stipulates that it agreed to the payment of at least a portion of the fees of Louise McClenny with Adams Resources.

Kahanek, Frank & Associates provided accounting services to the Partnerships. Their services were approved, at least tacitly, by Millennium.

Hamm Corporation claims that Millennium's approval of payments to any of the professionals listed results in an estoppel that bars complaints about any payments made later. The Agreements contain a "no waiver" provision that makes clear that an approval of or assent to a given breach shall not automatically operate as an approval of a subsequent breach.[13] However, an approval or assent early on in an ongoing engagement will operate as a waiver of the objection to payment of fees incurred, but not necessarily paid, before the objection is raised. By the same token, one may not stand mute and knowingly receive the benefit of a transaction (here, the services of a professional to the Partnerships), and thereafter be heard to complain that the transaction was not approved.

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[13] Agreement, Section 10.19.

As early as February, 2002, Hamm Corporation suggested retaining PWC to audit the Marriott records. The reaction of Millennium to the idea of an audit was always affirmative, yet its reaction to the idea of incurring substantial audit fees was negative. Instead, Millennium suggested using the services of the in house auditors of an Affiliate of Millenniums as a way of saving money. The issue was discussed repeatedly over a number of months, and a clear resolution does not appear in any document. The testimony on the subject is conflicting.

Here, the efforts of PWC were at least tacitly approved by Millennium. These fees were initially paid from the account of Hamm Corporation and later reimbursed by the Partnerships. Millennium knew that PWC had begun its work for the Partnerships, and on at least one occasion endorsed the effort in writing. No evidence was provided to support the proposition that a substan/tial portion of the fees paid to PWC were incurred after Millennium raised its protest. Unfortunately, PWC was unable to complete its audit before the institution of this litigation, as the result of apparent foot-dragging on Marriott's part.

As for the other payments, Millennium had no actual knowledge that these professionals had been retained and/or paid before raising its objections. There is also no evidence to support a finding that, after having learned the facts, Millennium unreasonably delayed in making its protest. To the contrary, the documents introduced indicate that Millennium consistently objected to retaining PKF to perform a market study and that it also objected to retaining attorneys until after the audit work was completed.

Hamm Corporation is liable to return to the Partnerships amounts paid to PKF, Jarrard Law Group, Fulbright & Jaworski and Robert Gerbin.

Permanent Loan Terms

Millennium complains that Hamm Corporation breached its duties under the Agreements and otherwise by negotiating and taking out permanent loans (included in the definition of "Financing"[14] in the Agreements) in behalf of four of the Partnerships: HM Austin Northwest, L.P.; HMC Compaq Center Drive, L.P.; HMT Compaq Center Drive, L.P.; and, HM Homewood, L.P. The complaint is apparently two-fold: First, that the loan term of eight years is disadvantageous to Millennium in the calculation of its Priority Return; and, second, that the various loan arrangements are cross-collateralized.

A General Partner is empowered to use its best business judgment in conducting the affairs of the Limited Partnership. Mere negligence in the exercise of business judgment does not amount to a breach of a fiduciary responsibility and is not actionable.

The Agreements empower the General Partner to arrange for the contemplated Financing. There is no requirement that such Financing must be the most advantageous to Millennium. Hamm Corporation exercised reasonable business judgment in arranging the terms of the Financing. Millennium's claim relating to the terms of the permanent financing is denied.

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[14] Agreement, Article 1, ¶ 19.

Fiduciary Duty/Exemplary Damages

The responsibility of a general partner to its limited partners is a fiduciary duty analogous to that of a trustee to its beneficiaries. Few relationships imply a higher degree of fidelity. In a case such as the one present here, the individual who controls the business affairs and operations of a corporate general partner bears a responsibility to the limited partners of the same character that the general partner owes. Here, W. Dow Hamm, III is the president and sole shareholder of Hamm Corporation. The activities of Hamm Corporation were controlled exclusively by Hamm.

The defalcations of Hamm Corporation and Hamm in the management of the affairs of the Partnerships were of the most egregious variety: they paid themselves hundreds of thousands of dollars in fees that were not allowed without the express and unanimous consent of the Limited Partners. Even if there had been some reason to argue that the payments were appropriate under one interpretation of the Agreements, it is the fiduciary's responsibility to have any questions over the proper construction resolved, through litigation if necessary, before the payments are made. The interpretations placed on the Agreements by Hamm Corporation and Hamm to justify the asset management and loan guaranty fee payments strain the limits of the language used, and were not asserted in good faith.

Exemplary damages are permitted in circumstances where evidence establishes a breach of these sensitive duties. Here, the evidence of self-dealing is clear and it is convincing – it is virtually uncontested that Hamm and Hamm Corporation paid out Partnership funds to themselves without the approval of Millennium and in spite of

Millennium's protests. An award of exemplary damages is appropriate.

Hamm Corporation and Hamm allege that Millennium owed a fiduciary responsibility to them and the Partnerships. A limited partner does not owe a fiduciary duty to its fellow partners, whether limited or general. Here, Hamm Corporation and Hamm allege that Millennium should be liable for damages because Millennium withheld its approval of the expenditures deemed necessary to pursue the claims of the Partnerships against Marriott. A party who is granted a right of approval may exercise that right as he deems appropriate and in his own interest. The Agreements do not limit the discretion of the Partners in exercising their rights.[15] The claim of Hamm Corporation and Hamm for damages resulting from this alleged breach of fiduciary responsibility on the part of Millennium is denied.

Civil Conspiracy

In early 2003, Millennium and Brindsen did confer with other real estate management firms regarding the Partnerships and the hotel properties. However, there is insufficient evidence in the record to sustain a finding that these meetings resulted in a plan between them to take affirmative action designed to harm Hamm Corporation or Hamm. Instead, it appears that these discussions were of the "what if" variety, and occurred after the relationships between the parties had already begun to unravel. The civil conspiracy claim is denied.

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[15] Agreement, Section 10.22.

Accounting, Dissolution

The actions of the Respondents discussed above justify the appointment of an uninterested third party to conduct an accounting of the Partnerships. The individual named below (the "Accountant") shall perform the accounting at the cost of the Partnerships and shall do so without the necessity of posting bond. The accounting shall address the sums awarded to the Partnerships herein, correction of the Priority Return calculations in accordance with this Award (including a determination of the Project Cost in each instance), the capital accounts of the Partners, and will generally review the financial records of the Partnerships to the extent deemed appropriate by the Accountant.

Hamm Corporation and Hamm shall immediately surrender all original accounting information and Partnership records to the Accountant, and shall execute all necessary authorizations for the release of Partnership information by third parties immediately upon the request of the Accountant. The accounting shall be completed as soon as reasonably practicable after confirmation of this Award.

Judicial expulsion of a partner is permitted in circumstances where the partner has engaged in conduct concerning the business of the partnership that make it not reasonably practicable to carry on the partnership business with that partner involved. The activities of Hamm Corporation found above make continuation of the business of the Partnerships with Hamm Corporation as the General Partner impracticable. Therefore, Hamm Corporation is expelled as the General Partner of each of the Partnerships. The expulsion shall be treated as a withdrawal in the manner set forth in Act Section 6.02.

The Arbitrator finds that the immediate dissolution of the Partnerships will be injurious to the interests of all Limited Partners. Therefore, in accordance with Agreement Section 8.1(c)(ii), the Limited Partners shall be afforded ninety (90) days following the date of this Award to agree in writing to continue the businesses of the Limited Partnerships and to select a new General Partner. During this period, the Accountant shall serve without bond as receiver of the Partnerships' businesses, and shall be empowered to conduct such activities in lieu of the General Partner. The person or firm selected to serve as the new General Partner shall not be an Affiliate of any Partner, unless the remaining partners shall unanimously so agree. In the event the Limited Partners fail for any reason to reach agreement, then the Accountant shall wind up the Partnerships' business affairs, and distribute the assets to the Partners in accordance with the terms of the Agreements.

Permanent Injunction

Hamm Corporation and Hamm presently retain control of the assets and income of the Partnerships. In the past, they have asserted rights to funds of the Partnerships to which they are not entitled, and they have paid to themselves funds belonging to the Partnerships in violation of their fiduciary duties to the Partnerships. Unless they are immediately and permanently restrained, there is a possibility that funds of the Partnerships may be misapplied. Therefore, Hamm Corporation and Hamm are enjoined as follows:

a. Hamm Corporation and Hamm shall not cause the funds or assets of any of the Partnerships to be transferred to any other

Partnership for any purpose or by any means;

b. Hamm Corporation and Hamm shall make no payments of asset management fees, or any sums in consideration of any services rendered by either of them for or on behalf of the Partnerships;

c. Hamm Corporation and Hamm shall make no payments of loan guaranty fees, or any sums in consideration of any pledge made by either of them for or on behalf of the Partnerships; and

d. Hamm Corporation and Hamm shall not contract with or make any payment of Partnership funds to any professional for services rendered on behalf of the Partnerships except as ordered herein or agreed by all of the Limited Partners.

Attorney Fees and Arbitration Expenses

Partnership Agreement, ¶ 10.15(f) provides that the expenses of the parties, including attorney fees, and the administrative fees and expenses of the American Arbitration Association ("the Association") shall be borne equally by the parties. However, this same provision allows the Arbitrator the discretion to allocate these expenses to "the prevailing party".

Each party shall bear its own attorney fees and litigation expenses incurred in this matter.

The administrative fees and expenses of the Association totaling $10,100.00 shall be borne equally by the parties. The compensation and expenses of the Arbitrator totaling

$15,751.50 shall likewise be borne equally and deducted from the amounts previously advanced to the Association.

Specific Relief Awarded

In view of the foregoing findings of fact and conclusions of law, the following relief is awarded:

A. W. Dow Hamm, III shall pay the following amounts to the Partnerships listed, as damages for improper loan guaranty fee payments:

   a. HM Austin Northwest, L.P., the sum of $100,109.72

   b. HMC Compaq Center Drive, L.P., the sum of $93,489.98

   c. HMT Compaq Center Drive, L.P., the sum of $74,668.92

   d. HM Homewood, L.P., the sum of $96,555.22

B. W. Dow Hamm, III Corporation shall pay the following amounts to the Partnerships listed, as damages for Improper asset management fee payments:

   a. HM Clear Lake, L.P., the sum of $32,889.94

   b. HM College Station, L.P., the sum of $32,021.22

   c. HM Austin Northwest, L.P., the sum of $28,364.72

   d. HMC Compaq Center Drive, L.P., the sum of $56,454.02

e. HMT Compaq Center Drive, L.P., the sum of $40,568.94

f. HM Homewood, L.P., the sum of $31,625.50

C. The books and records of HM Austin Northwest, L.P. shall be revised to delete the payment of $700,000 to Compass Bank in reduction of debt for the purposes of the calculation of the Priority Return only.

D. W. Dow Hamm, III and W. Dow Hamm, III Corporation shall pay to Millennium Income Fund, L.L.C., jointly and severally, the sum of $700,000.

E. W. Dow Hamm, III and W. Dow Hamm, III Corporation shall hold a right to payment of the same character as an Operating Deficit Contribution Return[16] respecting HM Austin Northwest, L.P. to the extent only that the sums awarded in Paragraph D above are paid.

F. W. Dow Hamm, III Corporation shall pay the following amounts to the Partnerships listed, as damages for improper professional fee payments:

a. HM Clear Lake, L.P., the sum of $5199.72

b. HM College Station, L.P., the sum of $5387.55

c. HM Austin Northwest, L.P., the sum of $5302.12

d. HMC Compaq Center Drive, L.P., the sum of $4823.05

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[16] Agreement, Article 1, ¶ 34.

e. HMT Compaq Center Drive, L.P., the sum of $5374.77

f. HM Homewood, L.P., the sum of $5417.12

G. W. Dow Hamm, III and W. Dow Hamm, III Corporation shall pay to Millennium Income Fund, L.L.C., jointly and severally, the sum of $150,000.00 as exemplary damages.

H. Scott C. Mitchell, CPA, 820 Gessner, Suite 1380, Houston, Texas 77024, telephone 713-827-7500, is appointed to perform an accounting of the Partnerships in accordance with this Award.

I. The Limited Partners of each Partnership are afforded a period of ninety (90) days following the date of this Award, during which the Partnerships shall be administered by the Accountant, serving in the role of receiver without bond, to reach an agreement for the continuation of the Partnerships and the selection of a new General Partner.

J. Hamm Corporation is expelled as General Partner of each of the Partnerships. A replacement General Partner shall be selected as set forth above or, if one is not select then the Accountant shall wind up the Partnerships and distribute their assets.

K. Hamm Corporation and Hamm are permanently enjoined as set forth hereinabove.

The above sums are to be paid on or before 30 days from the date of this Award. All sums not paid within 30 days following the date of this award shall bear interest at the rate of 10% per annum.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

SIGNED: /s/ Michael Landrum DATED: August 25, 2003
Michael Landrum Arbitrator

NO. 2003-13955

MILLENIUM INCOME FUND, LLC,	§	IN THE DISTRICT COURT OF
	§	
vs.	§	HARRIS COUNTY, TEXAS
W. DOW HAMM, III	§	
CORPORATION and	§	
W. DOW HAMM, III	§	61st JUDICIAL DISTRICT

ORDER

(Filed Dec. 4, 2003)

Defendants' Motion to Vacate or Modify Judgment and Arbitration Award is hereby DENIED.

Signed: DEC 05 2003, **2003.**

/s/ John Donovan
JUDGE PRESIDING

[SEAL] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 05-0709
COA #: 01-03-01209-CV

DATE: 1/27/2006

STYLE: W. DOW HAMM III AND W. DOW HAMM III CORPORATION
v. MILLENNIUM INCOME FUND, LLC

Today, the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO:
MR. JEFFERY T. NOBLES
BEIRNE MAYNARD & PARSONS L L P
1300 POST OAK BLVD SUITE 2500
HOUSTON TX 77056-3000

[SEAL] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 05-0709
COA #: 01-03-01209-CV

DATE: 5/5/2006

STYLE: W. DOW HAMM III AND W. DOW HAMM III CORPORATION
v. MILLENNIUM INCOME FUND, LLC

Today, the Supreme Court of Texas denied the petition for rehearing of the above-referenced petition for review.

MAIL TO:

MR. JEFFERY T. NOBLES
BEIRNE MAYNARD & PARSONS L L P
1300 POST OAK BLVD SUITE 2500
HOUSTON TX 77056-3000

9 U.S.C.A. § 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, c. 392, 61 Stat. 672.)

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9 U.S.C.A. § 10. Same; vacation; grounds, rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may

make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[**(5)** Redesignated (b)]

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to *section 580 of title 5* may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in *section 572 of title 5*.

9 U.S.C.A. § 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

(July 30, 1947, c. 392, 61 Stat. 673.)

---

9 U.S.C. § 13. Papers Filed with Order on Motions; Judgment; Docketing; Force and Effect; Enforcement.

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

(July 30, 1947, ch. 392, 61 Stat. 673.)

App. 73

No. 01-03-01209-CV

IN THE COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS

W. DOW HAMM III AND W. DOW HAMM III CORPORATION,

Appellants,

v.

MILLENNIUM INCOME FUND, L.L.C.,

Appellee.

ON APPEAL FROM THE 61ST DISTRICT COURT
OF HARRIS COUNTY, TEXAS

APPELLANTS' POST-SUBMISSION BRIEF

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ATTORNEYS FOR W. DOW
HAMM III AND W. DOW
HAMM III CORPORATION

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* * *

ARGUMENT

This post-submission brief addresses a series of questions that the panel asked during oral argument, that expressed its concern that the appellants may have waived error by (1) filing a motion to vacate or modify the judgment and arbitration award after the award had been confirmed, and (2) filing the arbitration record and exhibits with the district clerk instead of taking some additional action to bring it forward in the trial court. In addition, this brief attaches a detailed index of the Fourth Supplemental Clerk's Record, which provides specific page references to the clerk's record for all the contents of the arbitration record. (Tab 1.)

I. The early confirmation of the arbitration award did not bar the filing of the appellants' motion to vacate or modify judgment and arbitration award.

In the trial court, Millennium argued that Hamm "waived any complaint regarding the underlying award" because his motion to vacate the award was not filed and heard on or before September 5, 2003. Neither of the cases that Millennium cited in its trial court motion are authority for such an argument. Under the facts of this case and the governing law, Millennium was incorrect.

A. The arbitration award was confirmed only three business days after the motion to confirm was filed.

The arbitration award was delivered to the parties on the afternoon of August 26, 2003. (CR 38.) Millennium filed its motion to confirm the award on Friday, August 29,

the last day before the Labor Day holiday weekend, and set it for hearing on the following Friday, September 5, 2003, at 9:30 a.m. The motion's certificate of service does not reflect whether it was served by hand, facsimile, or by mail. (CR 36.)

There were only three working days between the filing of the motion and the hearing on the following Friday. Therefore, on Tuesday, September 2, the Hamm parties filed a motion for continuance, in which they explained that they were opposed to the confirmation of the award and that they would file a motion to vacate within 30 days:

> W. Dow Hamm III Corporation ("Hamm Corp") and W. Dow Hamm III ("Hamm") respectfully request a continuance on Millennium's application for confirmation of the arbitration award because they intend to prepare and present motions to vacate and/or modify the arbitration award pursuant to Texas Civil Practice and Remedies Code, Sections 171.088 and 171.091. These statutes allow applicants to contest arbitration awards within ninety (90) days of the date the applicant receives a copy of the award.
>
> Although Respondents do not anticipate needing ninety (90) days to properly contest the arbitration award, they do request a reasonable amount of time to do so. Arbitration in this matter was lengthy, lasting four (4) days. Numerous witnesses testified. Four (4) volumes of transcribed testimony were generated and over one thousand (1000) pages of exhibits were introduced. Respondents contend there are substantial factual and legal errors in the award and would respectfully request thirty (30) days to properly prepare their motions to contest the arbitration award

> prior to it being confirmed by this Court under Section 171.087.

(*See* Tab 2, a certified copy of the motion for continuance; 5th Supp. CR.)[1]

On September 5, the trial court denied the motion for continuance (CR at 73), and signed its judgment confirming the award "in all things." (CR at 54). As its ground for entry of a judgment confirming the award, Millennium had argued that the Hamm parties had already consented to the entry of an award under the rules of the American Arbitration Association. (CR 34.) Accordingly, the decretal paragraphs of the judgment, drafted by Millennium's counsel,[2] simply reiterate the relief set out in the arbitration award. (*Compare* CR 54-57 with CR 70-72.)

Just 38 days after the delivery of the award, and 28 days after the signing of the judgment, the Hamm parties filed their Motion to Vacate or Modify Judgment and Arbitration Award, and the arbitration hearing transcript and exhibits, with the Harris County District Clerk. (3rd Supp. CR at 55.) This motion was timely filed under all deadlines set by the relevant statutes and rules. 9 U.S.C. § 12 (notice of a motion to vacate, modify, or correct an award must be served within three months of award's delivery); TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (Vernon 2005) (application to vacate award to be made not later 90 days after award's delivery); TEX. R. CIV. P. 329b

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[1] The Harris County District Clerk is preparing a supplemental clerk's record that contains this filing, and it will be filed in this Court within the next several days.

[2] The document footers on the motion for confirmation and the judgment reflect that they were prepared in close sequence (documents 44412 and 44436), on the same computer. (CR 33, 53.)

(30 days to file motions for new trial and motions to modify, correct, or reform judgments).

Millennium filed its opposition to the motion to vacate on December 3, 2003, two days before the motion was heard on December 5. It asserted that "Hamm failed to make any effort to vacate, modify or correct the Award prior to its confirmation; accordingly, Hamm has waived any complaint regarding the underlying Award." (CR at 83.) Millennium cited two cases in support of this assertion. *The Hartbridge,* 57 F.2d 672 (2d Cir. 1932); *City of Baytown v. C.L. Winter, Inc.,* 886 S.W.2d 515 (Tex. App. – Houston [1st Dist.] 1994, writ denied). At the December 5 hearing, however, Millennium did not urge its waiver argument, and the trial court heard arguments on the merits of the motion before denying it. (RR 4-9, 23.)

B. *The Hartbridge,* its antecedents, and its progeny, do not hold that a motion to vacate must be filed sooner than the statutory deadlines.

Neither the Second Circuit's 1932 decision in *The Hartbridge,* nor this Court's decision in *City of Baytown v. C.L. Winter, Inc.,* hold that a party waives its right to file a motion to vacate if it does not accomplish that filing before an arbitration award is confirmed. Furthermore, that was not the holding of the San Antonio court in *GJR Mgmt. Hldgs., L.P. v. Jack Raus, Ltd.,* 126 S.W.3d 257 (Tex. App. – San Antonio 2003, pet. denied). In fact, appellants' research has located no decisions construing the FAA, the

TGAA, or any other similar arbitration statutes,[3] in which a court held that a motion to vacate, timely filed under the statutory deadlines, is waived if it is not filed before an award is confirmed.[4]

C. *The Hartbridge* is based on decisions in which the right to file a motion to vacate was waived by the parties' inconsistent actions.

In *The Hartbridge,* the Second Circuit held that the district court had erred in refusing to postpone a hearing on the confirmation of an arbitration award. The appellant, objecting to the district court's jurisdiction, had argued that the award could not be confirmed for three months, the deadline for filing a motion to vacate under

---

[3] Most state arbitration statutes are modeled on the Uniform Arbitration Act. *See* DRAFT REVISION OF UNIFORM ARBITRATION ACT, Prefatory Note at 2 (Nat'l Conf. of Comm'rs on Uniform State Laws, Oct. 9, 1998) (available online at http://www.law.upenn.edu/bll/ulc/uarba/arb398.pdf) (UAA has been adopted in 35 states and in some form in 14 other jurisdictions). Section 171.088 of the TGAA is modeled on section 12 of the 1955 UAA. Unif. Arbitration Act § 12 (1955) (available online at http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/uaa55.htm). Significantly, the drafters of the Revised UAA discussed a related timing issue in great detail – whether a motion to confirm could be heard before a motion to vacate – but never indicated that the confirmation of an award has any effect on a party's right to file its motion to vacate. *See* DRAFT REVISION OF UNIFORM ARBITRATION ACT at section 18, pages 99-102.

[4] In *Robinson v. Wells,* 669 P.2d 844 (Utah 1983), the Utah Supreme Court held that a motion to vacate was untimely when it was filed after an award was confirmed, but in that case, the award was delivered on May 21, 1981, and the motion to vacate was filed on October 20, 1981 – 152 days after the delivery of the award. *Id.* at 845 & 848 n.6. The Utah statute required that a motion to vacate must be filed within three months of the award's delivery. *Id.* at 847.

the Federal Arbitration Act. *Id.* at 672-73 (citing 9 U.S.C. § 12). The Second Circuit disagreed with the appellant's contention that the motion to confirm the award was premature, but nevertheless held that the district court had erred in denying the appellant's request to continue the hearing. Explaining its holding, the court stated:

> If confirmation did not preclude the appellant from thereafter moving to vacate the award, there was obviously no prejudicial abuse of discretion in entering the order of confirmation. *The District Court thought such a motion could still be made. With this we cannot agree.* As we understand the statute a motion to confirm puts the other party to his objections. He cannot idly stand by, allow the award to be confirmed and judgment thereon entered, and then move to vacate the award just as though no judgment existed. *See Gaines v. Clark,* 23 Minn. 64; *Brace v. Stacy,* 56 Wis. 148, 14 N.W. 51. *Section 12 sets an outside limit within which a notice to vacate must be served; it does not say that such a motion may be made at any time within the three months even though the award has gone into judgment. After judgment we think the award can be vacated only if the judgment can be, and to vacate the judgment an adequate excuse must be shown for not having presented objections to the award when the motion to confirm was heard.*

Id. at 673 (emphasis added). This highlighted language is dictum, because the Second Circuit did not hold that the appellant had waived the grounds of its motion to vacate. Indeed, the Second Circuit's opinion indicates that the appellant did not file a motion to vacate, even though the district court would have allowed it, before filing its notice

of appeal. 57 F.2d at 673 (notice of appeal was filed eight days after motion to confirm was granted).[5]

* * *

D. The confirmation of an award as a judgment does not insulate it from a motion to vacate.

At oral argument, the panel also asked questions that reflected a concern that the confirmation of an award makes it a judgment that is no longer subject to the ordinary grounds for vacating an arbitration award.

The confirmation of an arbitration award is the exception rather than the rule; "in the majority of cases the parties to an arbitration do not obtain court confirmation." *Florasynth, Inc. v. Pickholz,* 750 F.2d at 176. The confirmation of an award simply allows the recovering party to use judicial processes to enforce and collect the award. *See id.* Confirmation "is a summary proceeding that merely makes what is already final arbitration award a judgment of the court." *Id.* As a summary proceeding, the confirmation process is not a trial, and does not require the trial court to hear evidence or to make findings of fact. *See Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266,

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[5] For the reasons stated in this brief, the appellants do not believe that the dictum from *The Hartbridge* prevented the trial court from considering the merits of the motion to vacate. In light of the Court's concern over this issue, however, the appellants are considering the preparation and filing of a motion for leave to amend their brief, in the interest of justice, to assign error to the trial court's denial of their motion for continuance. *See* Tex. R. App. P. 38.7; *Rogers v. City of Fort Worth*, 89 S.W.3d 265, 284 (Tex. App. – Fort Worth 2002, no pet.) (considering argument raised in post-submission brief).

269 (Tex. 1992) (comparing summary proceedings to plenary proceedings).

* * *

App. 84

No. 01-03-01209-CV

IN THE COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS

W. DOW HAMM III AND W. DOW HAMM III CORPORATION,

Appellants,

v.

MILLENNIUM INCOME FUND, L.L.C.,

Appellee.

ON APPEAL FROM THE 61ST DISTRICT COURT
OF HARRIS COUNTY, TEXAS

APPELLANTS' AMENDED BRIEF

BEIRNE, MAYNARD & PARSONS, L.L.P.

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ATTORNEYS FOR W. DOW
HAMM III AND W. DOW
HAMM III CORPORATION

ORAL ARGUMENT REQUESTED

* * *

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* * *

ARGUMENT

I. Standard of review.

This is an appeal from the trial court's final judgment confirming an arbitration award. This Court reviews the trial court's judgment under *a de novo* standard. *Peacock v. Wave Tec Pools, Inc.*, 107 S.W.3d 631, 641 (Tex. App. – Waco 2003, no pet.); *Thomas James Assocs., Inc. v. Owens*, – 1 S.W.3d 315, 320 (Tex.App. – Dallas 1999, no pet.).

In this case, the parties agreed to submit their dispute to arbitration pursuant to the Federal Arbitration Act ("FAA"). (CR 16.) Usually, judicial review of an arbitration award is extraordinarily narrow under the FAA. *Gateway Tech. Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995). The FAA authorizes courts to set aside arbitration awards on the following grounds:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. (App. 2.)

* * *

IV. The trial court abused its discretion by denying the appellants' motion for continuance of the September 5 hearing.

At oral argument, this Court expressed its concern that, under the Second Circuit's opinion in *The Hartbridge*, 57 F.2d 672 (2d Cir. 1932), the confirmation of the award barred later challenges to it in the trial court and in this Court.[1] If so, then the trial court's order denying the appellants' motion for continuance constituted reversible error, because it prevented the appellants from properly presenting their case to this Court. TEX. R. APP. P. 44.1(a)(2).

The Hartbridge was an appeal from the confirmation of an arbitration award under the Federal Arbitration Act. The appellant informed the district court that it intended to file a motion to vacate, but that it could not move "forthwith" because certain arbitration exhibits had been lost. Nevertheless, the district court denied a continuance

[1] As argued in their post-submission brief, the weight of authority holds that the confirmation of an arbitration award does not bar a subsequent motion to vacate the award, unless the motion to vacate is filed outside the statutory deadlines, *e.g.*, *GJR Mgmt. Hldgs., L.P. v. Jack Raus, Ltd.*, 126 S.W.3d 257 (Tex. App. – San Antonio 2003, pet. denied), or the appellant waived its motion to vacate by inconsistent conduct in the trial court, *e.g.*, *Gaines v. Clark*, 23 Minn. 64 (1876).

of the confirmation hearing, and confirmed the award. *Id.* at 672-73. The Second Circuit disagreed that the motion to confirm was premature, but reversed the district court's judgment on the ground that it had believed that a motion to vacate could be filed after the award's confirmation. *Id.* In the circuit court's view, "the [district] court erred in confirming the award as of course, when it was advised that objections were to be made but could not be presented because of missing exhibits." *Id.*

This case presents circumstances similar to those in *The Hartbridge.* The appellants' motion for continuance requested "a reasonable amount of time to properly contest the arbitration award," and informed the trial court that appellants intended to file a motion to vacate or modify the arbitration award within 30 days.[2] (5th Supp. CR at 3.) As in *The Hartbridge,* the trial court denied the motion for continuance and confirmed the award. (CR at 73.) Further, as in *The Hartbridge,* the record reflects that the trial court believed that it retained power to entertain the appellant's motion to vacate the award, even after the award was confirmed. The trial court conducted a hearing

---

[2] The motion stated the following facts in support of this request:

> Although Respondents do not anticipate needing ninety (90) days to properly contest the arbitration award, they do request a reasonable amount of time to do so. Arbitration in this matter was lengthy, lasting four (4) days. Numerous witnesses testified. Four (4) volumes of transcribed testimony were generated and over one thousand (1000) pages of exhibits were introduced. Respondents contend there are substantial factual and legal errors in the award and would respectfully request thirty (30) days to properly prepare their motions to contest the arbitration award prior to it being confirmed by this Court under Section 171.087.

(5th Supp. CR at 3.)

on the motion to vacate, on December 5, 2003, and heard arguments on the merits of that motion. (RR at 1-9.)

There is no exclusive list of factors that Texas courts apply in determining whether the denial of a motion for continuance is an abuse of discretion. *See Levinthal v. Kelsey-Seybold Clinic, P.A.*, 902 S.W.2d 508, 510 (Tex. App. – Houston [1st Dist.] 1994, no writ) (discussing "nonexclusive" factors). This Court has considered several factors in other cases, including the following that are also relevant here: (1) the length of time the case had been pending, *Levinthal,* 902 S.W.2d at 510-11; (2) the due diligence of the party seeking the continuance, *id.*; (3) that the continuance was not sought for delay only, but so justice would be done, *Verkin v. Southwest Center One, Ltd.*, 784 S.W.2d 92, 94 (Tex. App. – Houston [1st Dist.] 1989, writ denied).

Length of time. The arbitration award was delivered to the parties on the afternoon of August 26, 2003. (CR 38.) Millennium filed its motion to confirm the award on Friday, August 29, the last day before the Labor Day holiday weekend, and set it for hearing on the following Friday, September 5, 2003, at 9:30 a.m. There were only three working days between the filing of the motion and the hearing on the following Friday.

There would have been no prejudice from a 30-day delay in hearing the motion to confirm, and the interests of justice would have been sewed by allowing the parties and the trial court sufficient time to analyze and understand the ramifications of the arbitrator's award. *See Verkin,* 784 S.W.2d at 94-95 (in landlord-tenant dispute, motion or continuance was erroneously denied when summary

judgment motion was filed 20 days after defendant's answer had been filed, and with 28 days of notice before hearing).

Due diligence. The appellants filed their motion for continuance with its detailed statement of grounds on September 2, 2003, the first business day after the motion to confirm was filed. In this motion, the appellants informed the trial court that they would file a motion to vacate within 30 days, two months earlier than the statutory deadlines under the TGAA and the FAA. Thus, the appellants were duly diligent in requesting a continuance and in pursuing their motion to vacate. *See Verkin,* 784 S.W.2d at 94 (defendant was duly diligent in seeking new trial counsel and filing motion for continuance 26 days after motion for summary judgment was filed); *see also Paley Assocs., Inc. v. Universal Woolens, Inc.,* 446 F. Supp. 212, 215-16 (S.D.N.Y. 1978) (under FAA, party duly "registered its objections" to confirmation of award by filing motion for continuance of confirmation hearing).

Continuance not sought for delay only, but so justice would be done. The motion for continuance demonstrated that the appellants did not seek undue delay, but required a reasonable period of time to analyze the arbitration award and to prepare a sound and correct motion to vacate. (5th Supp. CR at 3.) They sought only 30 days to file their motion, two months earlier than the FAA and TGAA deadlines. The appellants showed a willingness to expedite the filing of their motion so there would be no delay, and so the trial court would have an opportunity to consider their grounds for vacating the award before it was confirmed. For these reasons, a continuance of the confirmation hearing would have served the interests of justice.

As in *The Hartbridge,* the trial court committed a "prejudicial abuse of discretion" in denying the appellants' motion for continuance. 57 F.2d at 673. Therefore, as an alternative request for relief, the appellants ask that this Court set aside the judgment confirming the arbitration award, and remand this case to the trial court so that they may be allowed to "assert objections to the confirmation of the award." *Id.*

* * *

No. 05-___

IN THE SUPREME COURT OF TEXAS

W. DOW HAMM III and W. DOW HAMM III CORPORATION,
Petitioners,

v.

MILLENNIUM INCOME FUND, L.L.C.,
Respondent.

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

PETITION FOR REVIEW

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* * *

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ARGUMENT

I. The court of appeals misconstrued the arbitration statutes.

In refusing to consider the merits of Hamm's motion to vacate, the court of appeals misconstrued the federal and Texas arbitration statutes. Its decision is the first to hold that a motion to vacate filed within the statutory deadlines is too late. As such, it is certain to have significant impact if it is not corrected.

A. The court of appeals failed to give effect to express statutory language.

The Federal Arbitration Act and the Texas Arbitration Act[1] provide similar periods of time for filing a motion to vacate an arbitration award. The FAA allows three months,[2]

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[1] The parties' agreement specified that the FAA would govern any arbitration proceedings. (4th Supp. CR at 2:417 [App. C at 42].) In moving to confirm the award, however, Millennium cited and relied on the TAA. (CR at 34.) The First Court determined that the same result would apply under both statutes. (Slip op. at *5 n. 3 [App. A at 5 n.3].) Although the petitioners disagree with the First Court's conclusion, for purposes of this petition for review they agree that there is no substantive difference between the FAA and the TAA on this point. For the reasons stated in this petition, the motion to vacate was timely under either statute.

[2] "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C.A. §12 (west 1999) (hereinafter "FAA § 12") (App. D). This section of the FAA, which sets the three-month deadline for filing motions to vacate or modify an arbitration award, also includes a provision for staying an award's enforcement while the motion is being considered. FAA §12 (for purposes of motion to vacate or modify an award, the trial court "may make an order ... staying the proceedings of the adverse party to

(Continued on following page)

and the TAA, 90 days.[3] Under either statute, Hamm's motion was timely, because it was filed more than seven weeks before it was due. (3rd Supp. CR at 55.) The First Court's failure to give effect to FAA §12 or TAA §171.088(b) conflicts with this Court's precedent regarding the rules of statutory construction. *See Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000) (in construing a statute, "each sentence, clause and word is to be given effect if reasonable and possible"); TEX. GOV'T CODE ANN. §311.021(2) (Vernon 2005).

B. The court of appeals erroneously read other sections of the statutes to conflict with the statutory deadlines.

The court of appeals incorrectly held that FAA §9 and TAA §171.087 required Hamm to file its motion to vacate before the arbitration award was confirmed. Neither of these provisions deal with the deadlines for motions to vacate. FAA §9 sets a one-year deadline for filing a motion to confirm, but says nothing about the deadline for filing a

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enforce the award"). Thus, the First Court's stated concern that FAA §12 allows an enforceable judgment to be vacated (slip op. at *8) is addressed by the plan [sic] language of the statute: an enforceable award is subject to stay while a motion to vacate is pending.

[3] "A party must make an application under this section not later than the 90th day after the date of delivery of a copy of the award to the applicant." TEX. CIV. PRAC. & REM. CODE ANN. §171.088(b) (Vernon 2005) (hereinafter "TAA §171.088(b)") (App. E). In addition, the TAA includes a discovery rule for cases involving allegations of corruption, fraud, or other undue means: "A party must make an application under Subsection (a)(1) not later than the 90th day after the date the grounds for the application are known or should have been known." *Id.* These deadlines are irreconcilable with the First Court's construction of the statute.

motion to vacate.[4] Likewise, TAA §171.087(b) is silent regarding the deadline for motions to vacate.[5] The court of appeals mistakenly concluded that these sections trump the deadlines *expressly stated* in FAA § 12 and TAA § 171.088(b) because they "imply a due order of consideration." (Slip op. at *4 [App. A at 4].)

On their face, FAA §9 and TAA § 171.087(b) say only that a trial court must grant a party's application to confirm an award when the application is filed, unless (1) the award has already been vacated or modified, or (2) grounds for vacating or modifying it are offered before it is confirmed. These provisions can easily be harmonized with the three-month and 90-day statutory deadlines: if a motion to confirm is filed very early, as in this case, the trial court has discretion to confirm the award, and the opposing party may still file a motion to vacate within the time allowed by the statutes.

The court of appeals wrongly (1) interpreted these statutes to negate the provisions of the FAA and TAA that specifically governed the deadlines for Hamm's motion to vacate, and (2) failed to harmonize these statutes to give effect and meaning to all their terms. *See Columbia Hosp.*

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[4] "[A]t any time within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. . . . " 9 U.S.C.A. §9 (West 1999) (hereinafter "FAA §9") (App. D).

[5] "Unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091, the court, on application of a party, shall confirm the award." TEX. CIV. PRAC. & REM.CODE ANN. § 171.087(b) (Vernon 2005) (emphasis added) (hereinafter "TAA §171.087(b)") (App. E).

Corp. of Houston v. Moore, 92 S.W.3d 470, 472-73 (Tex. 2002) ("the more specific statute controls over the more general one"); *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002) (duty to harmonize).

C. "Confirmation" does not affect the right to file a motion to vacate.

The First Court expressed its "doubt that the respective legislative branches intended to require a trial court to consider such a motion [to vacate] when it is filed for the first time during a period that they also expressly designated for the judgment's enforcement." (Slip op. at *5 [App. A at 5].) This "doubt" is inconsistent with the FAA's actual legislative history.

1. The FAA's legislative history is explicit on this point.

The FAA was drafted by business groups and the American Bar Association, and adopted by Congress in 1925. Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act,* 78 NOTRE DAME L. REV. 101, 125 (2002). The author of the first draft was Julius Henry Cohen. *Id.* As Cohen explained at the time:

> [T]here need be a delay only of a few days between the time of application for its entry as a judgment – *which may follow immediately upon the award* – and its actual entry, and upon its entry it takes status as any other judgment, subject to execution and enforcement.

> The motion to confirm may be opposed *or an independent motion may be made to vacate, modify, or correct the award.*

Julius Henry Cohen, *The New Federal Arbitration Law,* 12 VA. L. REV. 265, 272 (1926) (emphasis added). As its author explained, the FAA allows *immediate* confirmation of an arbitration award, and it is not necessary to oppose confirmation. Instead, the FAA allows an independent motion to vacate, even if the award is immediately confirmed.

The court of appeals misunderstands the effect of the "confirmation" of an arbitration award, which simply allows the recovering party to use judicial processes to enforce and collect the award. *Florasynth, Inc. v. Pickholz,* 750 F.2d. 171, 176 (2d Cir. 1984); 4 IAN R. MACNEIL, FEDERAL ARBITRATION LAW §38.1.1 at 38:5 (1994). Confirmation "is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Florasynth,* 750 F.2d at 176. As Professor Macneil observes, "[c]onfirmation is expected normally to be a routine and unopposed hearing." 4 MACNEIL §38.3.2 at 38:38. FAA §12, however, expressly allows the filing of a motion to vacate for three months, a period that clearly extends beyond the very short time it takes to obtain summary confirmation of an arbitration award.

* * *

App. 103

No. 05-0709

IN THE SUPREME COURT OF TEXAS

W. DOW HAMM III and W. DOW HAMM III CORPORATION,
Petitioners,

v.

MILLENNIUM INCOME FUND, L.L.C.,
Respondent.

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

PETITIONERS' MOTION FOR REHEARING

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* * *

I. The First Court's opinion creates an unnecessary due process issue.

The First Court holds that an arbitration award, if immediately confirmed, cannot be vacated by the trial court or reviewed on appeal. This holding promises to generate confusion and gamesmanship in Texas courts, and unnecessarily so, because the holding is not based on the language of the arbitration statutes. At a constitutional level, it

creates a due process problem that requires review and correction by this Court.

A. The First Court's opinion denied petitioners a meaningful opportunity to be heard.

Although the First Court did not recognize it, the circumstances of this case arose from gamesmanship, a rush to confirmation that allowed Millennium to obtain a final judgment just 10 days after the award was delivered.

The arbitration award was faxed to the parties at 3:22 p.m. on the afternoon of August 26, 2003.[1] Millennium filed its motion to confirm the award on Friday, August 29, the last day before the Labor Day holiday weekend, and set it for hearing on the following Friday, September 5, 2003, at 9:30 a.m. There were only three working days between the filing of the motion and the hearing on the following Friday. Therefore, on Tuesday, September 2, the petitioners filed a motion for continuance, in which they explained that they were opposed to the confirmation of the award and that they would file a motion to vacate within 30 days. Their motion explained:

> Although Respondents do not anticipate needing ninety (90) days to properly contest the arbitration award, they do request a reasonable amount of time to do so. Arbitration in this matter was lengthy, lasting four (4) days. Numerous witnesses testified. Four (4) volumes of transcribed testimony were generated and over one thousand (1000) pages of exhibits were introduced. Respondents contend there are substantial factual

[1] CR 38.

> and legal errors in the award and would respectfully request thirty (30) days to properly prepare their motions to contest the arbitration award prior to it being confirmed by this Court under Section 171.087.[2]

At the September 5 hearing, the trial court denied the motion for continuance, and signed its judgment confirming the award.[3]

Just 38 days after the delivery of the award, and 28 days after the signing of the judgment, the petitioners filed their Motion to Vacate or Modify Judgment and Arbitration Award.[4] This motion was filed more than seven weeks earlier than the deadlines set by the arbitration statutes, and two days early under the Texas rules.[5] At the December 5 hearing on the motion to vacate, the trial court heard the motion on its merits before denying it,[6] and the petitioners sought appellate review in the First Court of Appeals.

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[2] 5th Supp. CR.

[3] CR at 54.

[4] 3rd Supp. CR at 55.

[5] 9 U.S.C. § 12 (notice of a motion to vacate, modify, or correct an award must be served within three months of award's delivery); TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (Vernon 2005) (application to vacate award to be made not later 90 days after award's delivery); TEX. R. CIV. P. 329b (30 days to file motions for new trial and motions to modify, correct, or reform judgments).

[6] RR 4-9, 23. In its response to the motion to vacate, Millennium briefly argued that the motion to vacate could not be heard after the award's confirmation. (CR 83.) It did not raise this objection at the hearing, however, and it did not carry this argument forward in its appellee's brief.

At oral argument, the First Court raised an issue that had not been briefed by the parties on appeal: whether the confirmation of the award barred the trial court and the court of appeals from considering the grounds of the motion to vacate. The parties submitted extensive post-submission briefing on the issue, in which they agreed that the appeal should be decided on its merits. The First Court nevertheless held that the Federal Arbitration Act (FAA) and the Texas General Arbitration Act (TAA) imply that a motion to modify or vacate an arbitrator's award cannot be filed in the trial court after it has been "confirmed" in the trial court. In the more than 80 years since the FAA was adopted, no other American court has held that a motion to vacate, filed within the statutory deadline, was untimely because the award was immediately confirmed by a trial court judgment.

B. Due process requires a meaningful opportunity to be heard.

Under the holding of the First Court of Appeals, the federal and Texas arbitration statutes denied Hamm the opportunity to present his objections to the arbitration award in the trial court, even though the award was confirmed almost immediately, before the arbitration record was available to the parties and before Hamm had time to prepare and file his motion to vacate. This was a denial of due process. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to

present their objections."[7] Procedural due process requires an appropriate and *meaningful* opportunity to be heard.[8] As this Court has written:

> Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. What process is due is measured by a flexible standard that depends on the practical requirements of the circumstances. This flexible standard includes three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[9]

All the elements of a claim for due process deprivation are present in this case.

No meaningful opportunity to be heard. The First Court's holding denied the petitioners an appropriate and meaningful opportunity to be heard. The arbitration statutes provided the petitioners a three-month period for filing their motion to vacate, and it was impossible for them to obtain the arbitration record and file a motion to vacate before September 5, 2003, as detailed in their

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[7] *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 81 (1988).

[8] *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998); *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 429 (Tex. 2004) (O'Neill, J., concurring).

[9] *University of Texas Medical School at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995).

uncontroverted motion for continuance. The First Court's opinion established a *sui generis* procedural rule that neither the petitioners nor the trial counsel had any reason to predict or follow. In requiring that a motion to vacate must be filed even before the complete arbitration record was available, the First Court created an impossible and unconstitutional condition for judicial review.[10]

Substantial private interest. There can be no dispute that the arbitrator's award caused a devastating injury to Mr. Hamm's private rights. It ordered the removal of Mr. Hamm as general partner of the partnerships in which Millennium was a limited partner, and the appointment of a receiver who has caused the partnerships to dissolve and to sell their assets, six Marriott hotels located in Texas and Alabama. In *Peralta,* the Supreme Court held that the "serious consequences" of losing one's property rights was a due process violation.[11]

Substantial risk of erroneous deprivation. The risk of an erroneous deprivation is immeasurably greater if the immediate confirmation of an arbitration award prevents a trial or appellate court from considering the grounds for setting it aside. A trial court is free to confirm an arbitration award immediately after it is confirmed.[12] There need be "a delay only of a few days" between the arbitrator's delivery of an award and its entry as a judgment,

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[10] *Diaz v. Westphal,* 941 S.W.2d 96, 100 (Tex. 1997); *see Clearwater v. Skyline Constr. Co.,* 835 P.2d at 263 (recognizing that there are situations where it is impossible to file a motion to vacate before confirmation.

[11] *Peralta,* 485 U.S. at 81.

[12] 9 U.S.C. § 9.

according to the principal author of the FAA.[13] If, as the FAA expressly allows, a motion to vacate may be granted if it is filed with three months, the risk of immediate confirmation causing an erroneous deprivation is cured. Under the First Court's interpretation of the FAA, however, immediate confirmation prevents a court from ever reviewing the award.

No governmental interest in the First Court's new procedural rule. It is difficult to imagine any interest that the government has in barring consideration of a motion to vacate in cases where an arbitration award is immediately confirmed. The truth is quite the opposite, in light of the actual language of the FAA, which allows an independent motion to vacate to be considered after an award is confirmed, so long as vacatur is sought within three months of delivery.[14] Due process, in fact, requires judicial review of arbitration awards.[15] The governmental interest in due process calls for a literal construction of the FAA, one that facilitates judicial review and does not frustrate it, in contrast with the First Court's holding in this case.

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[13] Julius Henry Cohen, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 272 (1926).

[14] 9 U.S.C. § 16; Cohen, *The New Federal Arbitration Law*, 12 VA. L. REV. at 272.

[15] *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (U.S. 1985) (addressing due process concerns); *Glennon v. Dean Witter Reynolds*, 83 F.3d 132, 139 (6th Cir. 1996); *McClelland v. Azrilyan*, 31 F.Supp. 2d 707, 712 (W.D.Mo. 1998).

C. Due process requires meaningful review of a punitive damages award, even in arbitration cases.

The arbitrator's award of punitive damages against the petitioners compounds the due process problems in this case. In the courts below, Mr. Hamm maintained that his actions as general partner were within his rights and obligations under the Partnership Agreements, and that there was no evidence to support the punitive damages award. Due process requires judicial review of a punitive damages award for excessiveness, rationality, and evidentiary support, even in arbitration cases.[16] The First Court's opinion deprived the petitioners of meaningful judicial review in this case, and creates a new possibility that such review will be lacking in future cases.

D. The First Court construed the arbitration statutes to create an unnecessary conflict with constitutional principles.

Thus, the First Court's erroneous construction of the arbitration statutes creates unnecessary constitutional issues. Wherever possible, statutes must be interpreted in accordance with constitutional principles.[17] The First

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[16] *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 139 (6th Cir. 1996) ("We conclude that the manifest disregard of the law standard permits vacatur of those punitive damage awards that are supported by no evidence."); *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 274-75 (N.Y. App. Div. 2003) (applying rigorous judicial review, under FAA, to award of punitive damages, because of federal due process concerns).

[17] *Industrial Accident Board v. O'Dowd*, 157 Tex. 432, 436 (Tex. 1957); TEX. GOV'T CODE ANN. § 311.021(1) (Vernon 2005).

Court's opinion was inconsistent with this rule of statutory construction, and this error is important to the jurisprudence of this State.

II. The parties agreed to enlarge the scope of judicial review.

In deciding not to review the merits of the motion to vacate the arbitration award, the court of appeals avoided an important legal question: whether the parties' arbitration agreement enlarged the standard of review under the Federal Arbitration Act.

In their Partnership Agreement, Hamm and Millennium negotiated for an arbitration clause that expanded the powers of the courts to review any arbitration award for legal error.[18] They agreed that an arbitrator could not amend, supplement, or reform in any manner any of the rights or obligations of the partners under their partnership agreements, and that an arbitration award that misinterpreted the rights and obligations of the partners could not be enforced by a court. This agreement to limit the arbitrator's powers expanded the default standard of review provided by the FAA.

This Court has addressed,[19] but never answered, the question of whether parties can contractually enlarge the

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[18] (4th Supp. CR at 2:417 [App. C at 42].)

[19] *See Mariner Fin'l Group, Inc. v. Bossley*, 79 S.W.3d 30, 36 (Tex. 2002) (Owen, J., concurring) (assuming, without deciding, that parties can contractually enlarge the standard of review under the FAA). In *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 251 (Tex. App. – Houston [14th Dist.] 2003, pet. denied), the Fourteenth Court surveyed national decisions and concluded that "The parties may agree to expand judicial review of an arbitration award beyond the scope of the FAA."

standard of review under the FAA.[20] There is a split of authority among the federal circuits on this question, with the Third, Fourth, and Fifth Circuits holding that parties may bargain for an expanded standard of review, inasmuch as arbitration is a creature of contract.[21] The Ninth and Tenth Circuits have held to the contrary, and the United States Supreme Court has not yet resolved the conflict.[22] Whether parties have the power to limit an arbitrator's powers, or to enlarge the scope of a reviewing court's powers, are significant questions that the trial court, the First Court, and this Court have chosen not to address in this case.

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[20] A concise summary of the question is provided in a recent article:

> In recent years, there has been "growing concern" about the "risks presented by arbitration's limited scope of review." Arbitrators selected for their familiarity with a particular industry often lack the sophistication to appreciate all of the legal issues raised. As a result, there have been "several conspicuous, high stake disputes" and countless lower-profile cases in which arbitrators have issued decisions "well outside the reasonable expectations of the parties." To offer protection against such unpredictable or biased decision-making, without sacrificing all the benefits of arbitration, parties have begun to include clauses in their arbitration agreements seeking to expand the scope of judicial review.
>
> The legal status of such clauses remains uncertain. . . .

Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOTIATION L. REV. 171, 173 (2003).

[21] *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001), *cert. denied*, 534 U.S. 1172 (2002); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (table), 1997 WL 452245 (4th Cir. Aug. 11, 1997) (per curiam); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995).

[22] *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003), *cert. dismissed*, 540 U.S. 1098 (2004); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

Recently, Professor Alan Scott Rau has observed that, in substantial commercial transactions like those involved in this case, parties are increasingly using custom-tailored arbitration clauses to enlarge the standard of review and diminish the finality of awards.[23] Judge Edith Jones provided a concise discussion of the competing interests of efficiency and party autonomy, in holding that parties are free to expand the scope of judicial review by contract:

> The district court accordingly erred when it refused to review the "errors of law" de novo, opting instead to apply its specially crafted "harmless error standard." This choice apparently reflected the district court's unwillingness to enforce the parties' contract because "the parties have sacrificed the simplicity, informality, and expedition of arbitration on the altar of appellate review." Prudent or not, the contract expressly and unambiguously provides for review of "errors of law"; to interpret this phrase short of de novo review would render the language meaningless and would frustrate the mutual intent of the parties. When, as here, the parties agree contractually to subject an arbitration award to expanded judicial review, federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract.[24]

Hamm and Millennium employed lawyers to draft, negotiate, and execute partnership agreements that set out their respective rights and obligations. Recognizing

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[23] *Alan Scott Rau, The Culture of American Arbitration and the Lessons of ADR*, 40 Tex. Int'l L.J. 449, 454 (2005).

[24] *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d at 997.

that the stakes were high and that conflict was possible, they also agreed on a dispute resolution procedure that they believed would be the most likely to arrive at a reliably correct result.

Mr. Hamm also relied on the advice of counsel in performing the Agreement. When Millennium challenged his right to be compensated for his services as general partner, the dispute was referred to arbitration. To ensure that meaningful judicial review would be available, the parties paid a court reporter to transcribe the arbitration hearings, so that a complete record was made available to the trial court and the court of appeals. At every stage of the arbitration and judicial proceedings, the parties have engaged legal counsel. These proceedings bear witness to the parties' expectation that a non-jury proceeding, with judicial review of the arbitration award, was the best vehicle for protecting their rights under their agreements. The First Court's holding that Hamm had waived any right to review of the arbitrator's award frustrates the parties' expectations.

III. The First Court's opinion conflicts with federal precedent.

The court of appeals' opinion also conflicts with sound federal precedent construing the FAA in a manner that avoided the constitutional issue.[25] *Paley Assocs., Inc. v. Universal Woolens, Inc.*, involved circumstances similar to this case. In *Paley*, the district court was asked to postpone ruling on a motion to confirm an arbitration award, and to

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[25] *Paley Assocs., Inc. v. Universal Woolens, Inc.*, 446 F.Supp. 212 (S.D.N.Y. 1978).

provide the responding party an opportunity to cross-move for an order vacating the award.[26] The district court denied the request, confirmed the award, and explained: "having now registered its objection to confirmation of the award, [Paley] has preserved its right to move later to vacate the confirmation if it has any worthy grounds to do so."[27] The district court's order properly recognized that the confirmation of an award does not bar subsequent review by the trial court or by appellate courts.

* * *

V. Judicial review is important.

The FAA was originally enacted over fears that there would be no judicial or appellate review of mistaken arbitration awards. Julius Henry Cohen, the FAA's principal author, explained that the FAA procedures allowing for judicial review were an important check on "mistakes and other human frailties" in arbitrators and trial courts.[28]

The parties contracted for judicial review of the arbitrator's award, by agreeing that

> Judgment upon the award rendered by the arbitrator acting pursuant to this Agreement may be entered in, and enforced by, any court having jurisdiction absent manifest disregard of applicable law; provided, however, that the arbitrator shall not amend, supplement, or reform in any manner

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[26] *Id.* at 215.

[27] *Id.* at 216.

[28] Julius Henry Cohen, *The New Federal Arbitration Law*, 12 VA. L. REV. at 274.

> any of the rights or obligations of any Partner hereunder or the enforceability of any of the terms of this Agreement.[29]

These words were carefully chosen, to assure the parties that the arbitrator would enforce their agreements, and would not substitute his own judgment for theirs.

No court has attempted a meaningful review of the arbitrator's interpretation of the partnership agreements in this case. Mr. Dow Hamm has developed real estate in Texas and Oklahoma for more than 30 years and, as the arbitration record reflects,[30] his reputation for honesty, skill, and competence is among his greatest assets. The arbitrator's mistaken view that Mr. Hamm's actions were not authorized by the partnership agreements has threatened his reputation, his contractual expectations and his livelihood. Similarly, the First Court's mistaken holding has threatened his rights to judicial review and due process.

The petitioners recognize that this Court's time and resources are precious. There is no need, however, for the Court to devote its limited resources to the more difficult substantive issues avoided by the court of appeals. The narrow procedural issue that the First Court raised, *sua sponte,* is well-settled under the language of the arbitration statutes and previous judicial decisions, and provides a narrow ground for decision in this case. The issues relating to the standard of review and the interpretation of the parties' agreements are very important, but they are properly left to the lower courts.

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[29] 4th Supp. CR at 2:417 [App. C at 42].

[30] 4th Supp. CR at 16:3494 [R. at 711].

PRAYER

For the reasons presented above and in their petition for review, petitioners respectfully request that this Court grant review, reverse the judgment of the court of appeals, and remand this case to the court of appeals for consideration of the merits of their appeal. Petitioners further request all other relief they are entitled to receive.

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